This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at http://books.google.com/

ARTES
SCIENTIA
VERITAS
LIBRARY OF THE
UNIVERSITY OF MICHIGAN

JK
271
.D364
1914

READINGS IN AMERICAN GOVERNMENT AND POLITICS

THE MACMILLAN COMPANY
NEW YORK · BOSTON · CHICAGO
ATLANTA · SAN FRANCISCO

MACMILLAN & CO., LIMITED
LONDON · BOMBAY · CALCUTTA
MELBOURNE

THE MACMILLAN CO. OF CANADA, LTD.
TORONTO

READINGS IN AMERICAN GOVERNMENT AND POLITICS

BY

CHARLES A. BEARD, PH.D.

ADJUNCT PROFESSOR OF POLITICS IN COLUMBIA UNIVERSITY

New York

THE MACMILLAN COMPANY

1910

All rights reserved

COPYRIGHT, 1909,
BY THE MACMILLAN COMPANY.

Set up and electrotyped. Published September, 1909. Reprinted August, 1910.

Norwood Press
J. S. Cushing Co. — Berwick & Smith Co.
Norwood, Mass., U.S.A.

PREFACE

THIS collection of illustrative materials is designed to accompany my *American Government and Politics*, now in preparation, and the choice and arrangement of the selections have been dominated by the plan of that volume. However, I hope that the pages which follow may be used with profit in connection with other manuals, and read with some interest by the student of government who wishes to go beyond the statements of text writers for his information.

While the materials come from a large variety of sources, I have chosen wherever possible from the writings of men who have had a practical experience in the conduct of government. I have also sought to illustrate the larger and more permanent features of our political system, rather than to furnish a "handy guide to the law and practice." To facilitate the work of the student and teacher, I have endeavored to make each extract clear, compact, and self-explanatory, and in several instances I have condensed considerably by omitting obscure allusions and passages not bearing directly on the principles which I have wished to bring out. To avoid marring the pages with unsightly "points," I have merely placed an asterisk at the head of each selection which has been subjected to this process of condensation. The side notes are intended primarily to help the teacher in conducting class discussions.

I am indebted to the editors of several magazines for the privilege of making extracts from valuable articles. Mr. Alexander Holtzoff has made many long and painstaking searches for me into the fugitive literature of party politics, and I am under special obligations to him. Mr. Frederic W. Erb, of

221485

the Loan Division of the Columbia University Library, and his assistants have lightened my labors by the courteous and efficient manner in which they have placed thousands of volumes at my disposal during the past twelve months.

CHARLES A. BEARD.

PARK LANE,
NEW MILFORD, CONNECTICUT,
July, 1909.

NOTE. Each extract is numbered, and the source from which it is taken can be found by referring to the proper number in the Table of Contents and List of Citations.

CONTENTS AND LIST OF CITATIONS

PART I. HISTORICAL FOUNDATIONS

CHAPTER I

Colonial Origins of American Institutions

PAGE

1. The royal province 2
   Bouton, N. (editor), *Provincial Papers: New Hampshire* (1749–63), VI, 908 *sqq.*
2. The corporate colony 6
   Poore, *Constitutions of the United States*, II, 159 *sqq.*
3. The proprietary colony 9
   Ibid., II, 1538.
4. A Boston town meeting 11
   Boston Town Records, 1758–69, 1–9, *passim.*
5. Local government in Virginia 13
   Hening, *Statutes at Large*, V, 489 *sqq.*, and 175.
6. Political theory before the Revolution 14
   Elliot, A., *An Election Sermon* (1765), 13–19, *passim.*

CHAPTER II

Independence, Union, and Self-government

7. The Boston committee of correspondence 16
   Boston Town Records, 1770–77, 92 *sq.*
8. Massachusetts calls the first Continental Congress 18
   Force, *American Archives* (4th series), I, 420.
9. Appointment of the South Carolina delegates 19
   Journals of the Continental Congress, 1774–89, I, 23 *sq.*
10. The Declaration of Independence 20
11. The Articles of Confederation 25
12. Continental Congress recommends the establishment of state governments 35
    Journals of the Continental Congress (1906), V, 342, 357 *sq.*

PAGE

13. The call for the Maryland state convention 36
Proceedings of the Conventions in the Province of Maryland (Annapolis, 1774–76), 184 *sq.*

CHAPTER III

The Establishment of the Federal Constitution

14. Madison's criticism of the Articles of Confederation . . . 38
Letters and Other Writings of James Madison (Federal edition), I, 320 *sqq.*
15. The call for the Constitutional Convention of 1787 43
Elliot's Debates, I, 120.
16. New York resolves to appoint delegates 44
Ibid., I, 127.
17. Difficulties confronting the Convention 44
The Federalist, No. XXXVI.
18. Hamilton's plea for a strong and stable government . . . 47
The Works of Alexander Hamilton (Federal edition), I, 401 *sqq.*
19. Philosophy of the American constitutional system 49
The Federalist, No. X.
20. Transmission of the Constitution to Congress 53
Elliot's Debates, V, 541.
21. Ratification of the new Constitution 54
Tiffany, J., *A Treatise on Government and Constitutional Law*, 81.

CHAPTER IV

The Development of the Federal Constitution

22. The formal amending process 56
The federal Constitution, Art. V.
23. Initiation of an amendment 57
Bulletin of the Bureau of Rolls and Library of the Department of State, No. 7 (1894), p. 520.
24. Ratification of an amendment by a state 58
Ibid., 522.
25. Official proclamation of an amendment 58
Ibid., 636 *sq.*
26. Initiation of an amendment by a state 60
Senate Document, 60th Congress, 1st Sess., No. 518, 51 *sq.*

PAGE

27. Judicial expansion of the Constitution 62
McCulloch *v.* Maryland, 4 Wheaton, 316 *sqq.*

28. Congressional expansion of the Constitution 66
Congressional Record, XXXV, Part 7, 6752 *sqq.*

29. The Constitution and executive practice 69
Curtis, *The Republican Party*, I, 406.

30. The third term doctrine 70
Works of Jefferson (1855), IV, 565; *Congressional Record*, IV, Part 1, 228.

CHAPTER V

The Development of State Constitutions

31. Early state constitutions 72
Poore, *Constitutions of the United States*, I, 402 *sqq.*; 821 *sqq.*

32. American rotten boroughs 75
Niles, *Weekly Register* (1821), VIII (new series), 99 *sq.*

33. An appeal for the right to vote 78
Proceedings and Debates of the Virginia State Convention of 1829–30, 25 *sq.*

34. An argument against popular suffrage 79
Ibid., 369 *sqq.*

35. The doctrine of rotation in office 81
Proceedings and Debates of the Convention of Pennsylvania (1837), II, 412 *sqq.*

36. Restrictions on special legislation 84
Debates of the Convention of Pennsylvania (1872), II, 590 *sq.*

37. Recent tendencies in constitutional development 87
The Constitution of Oklahoma, *passim*.

CHAPTER VI

The Evolution of Political Issues in the United States

38. Federalists and Jeffersonians 92
The Writings of Thomas Jefferson (1855), III, 290 *sqq.*

39. The Whig Party 94
Stanwood, *A History of the Presidency* (1903), 180.

40. The Democratic party as the champion of slavery 95
Ibid., 249 *sq.*

41. The platform of the Republican party in 1860 96
Ibid., 291 *sqq.*

PAGE

42. The Republican party and war politics 100
Stanwood, *A History of the Presidency* (1903), 369 *sqq.*

43. The character of Democratic opposition in 1884 103
Ibid., 434 *sqq.*

44. The social cleavage of 1896 105
Official Proceedings of the Democratic National Convention, 1896, 228 *sqq.*

45. Contemporary political issues 107
Official Platform, published by the Republican National Committee, 1908.

CHAPTER VII

The Development of Party Machinery

46. The legislative nominating caucus 112
Hammond, J. D., *The History of Political Parties in the State of New York*, I, 437 *sq.*

47. The congressional caucus for nominating presidential candidates . 114
Niles, *Weekly Register*, I (third series), 388 *sqq.*

48. The Tennessee legislature protests against the caucus . . . 116
Ibid., I (third series), 137 *sq.*

49. Jackson's first national convention 119
Ibid., VI (fourth series), 234.

50. Benton's criticism of the convention system 120
Benton, T. H., *Thirty Years' View* (1854), I, 49 *sq.*

51. Lincoln's defense of the convention as a state party institution . 123
Complete Works of Abraham Lincoln (Gettysburg edition), I, 252 *sqq.*

52. The municipal boss 125
The New York *Times*, October 22, 1898.

53. A state political machine 127
Ostrogorski, *Democracy and the Organisation of Political Parties*, II, 398 *sqq.*

54. The political party included in the legal framework of government 131
Statutes of the State of Oregon relating to Elections (1907).

PART II. THE FEDERAL GOVERNMENT

CHAPTER VIII

THE GENERAL PRINCIPLES OF THE FEDERAL SYSTEM OF GOVERNMENT

PAGE

55. Original limitations on the power of the federal government . . 134
The federal Constitution.

56. Limitations imposed on the federal government by the Amendments 135
Ibid., Amendments I–XI.

57. The theory of the separation of powers in the federal Constitution . 138
Kilbourn *v.* Thompson, 103 United States Reports, 168.

58. The supremacy of federal law 140
Ableman *v.* Booth, 21 Howard, 506.

59. The suffrage under the federal Constitution 143
Revised Record of the Constitutional Convention of New York (1894), I, 618 *sqq.*

60. Reciprocal guarantee of privileges and immunities among the several states 146
Story on the Constitution (1905), II, 582 *sqq.*, note.

61. Interstate rendition 148
Report of the Attorney-General of Iowa (1904), 226 *sqq.*

62. The national character of citizenship 150
United States *v.* Wong Kim Ark, 169 United States Reports, 649 *sqq.*

CHAPTER IX

THE NOMINATION AND ELECTION OF THE PRESIDENT

63. Constitutional provisions relating to the election of the President . 154
The federal Constitution.

64. The choice of presidential electors 157
Richardson, *Presidential Messages*, IX, 208 *sqq.*

65. Counting the electoral vote in the states 159
Statutes of the State of Oregon relating to Elections, 1907.

66. The call for the national convention 160
Official Call, issued by the Republican Committee, 1908; *Official Report of the Proceedings of the Democratic National Convention*, 1904, 1.

67. Convention oratory 164
Ibid., 161 *sqq.*

68. The Democratic unit rule 167
Ibid., 247 *sq.*

PAGE

69. The chairman of the national committee 169
The Atlantic Monthly, 1902, LXXXIX, 76 *sqq.*

70. The national campaign 171
Review of Reviews, XIV, 554 *sqq.*

CHAPTER X

The Powers of the President

71. Constitutional provisions 176
The federal Constitution.

72. The President as head of the national administration . . . 177
Opinions of the Attorneys-General, VII, 460 *sqq.*

73. The President as national spokesman in foreign affairs . . . 183
American State Papers (second edition), I, 198.

74. The war powers of the President 184
Richardson, *Presidential Messages*, IV, 674 *sqq.*

75. The political implications of the veto power 187
The Works of Daniel Webster (eleventh edition), I, 266 *sqq.*

76. The presidential message 192
Benton, T. H., *Thirty Years' View* (1854), II, 32; Richardson, *Presidential Messages*, I, 325.

77. Executive influence on congressional legislation 193
Congressional Record, XL, Part 5, 4777 *sqq.*

78. How executive departments may draft bills 196
Ibid., XVII, Part 1, 463.

CHAPTER XI

The National Administration

79. The President's power of removal 197
Shurtleff *v.* United States, 189 United States Reports, 311.

80. The executive departments and Congress 200
Congressional Record, XL, Part 1, 22 *sqq.*

81. Power of administrative officials to decide cases affecting life, liberty, and property 202
United States *v.* Ju Toy, 198 United States Reports, 253 *sqq.*

82. Fraud orders of the post-office-department 204
Congressional Record, XLI, Part 1, 707 *sqq.*

83. The spoils system in national administration 206
Senate Reports, 47th Congress, No. 567.

PAGE

84. The civil service act 208
Report of the United States Civil Service Commission (1908), 43 *sqq.*

85. President Cleveland and the place hunters 211
Richardson, *Presidential Messages*, IX, 399 *sq.*

86. Senatorial courtesy 212
Boutwell, G. S., *Reminiscences of Sixty Years in Public Affairs*, II, 282.

87. Congressmen and federal officers 213
Lincoln, *Works*, II, 106 *sq.*

CHAPTER XII

The Congress of the United States

88. Provisions of the federal Constitution relative to the organization of Congress 214
The federal Constitution.

89. The apportionment of representatives among the states . . . 218
Statutes at Large, XXXI, 733.

90. The art of gerrymandering 219
Speeches and Addresses of William McKinley, 23 *sq.*

91. The law governing the election of Senators 221
Compiled Statutes of the United States, I, 7 *sq.*

92. The original purpose of the Senate 222
The Federalist, Nos. LXII and LXIII.

93. Popular election of Senators in Oregon 225
Same as above, No. 65.

94. The question of popular election of Senators 226
Senate Document, 60th Congress, 1st Sess., Nos. 512 and 518.

95. The instruction of representatives in Congress 233
Congressional Record, XVII, Part 1, 121; *The Works of Henry Clay* (Federal ed.), VIII, 135.

CHAPTER XIII

The Powers of Congress

96. Express powers conferred on Congress by the Constitution . . 236
The federal Constitution.

97. The doctrine of strict construction 237
MacDonald, William, *Select Documents* (1776–1861), 77 *sqq.*

PAGE

98. The doctrine of liberal construction 240
Gibbons *v.* Ogden, 9 Wheaton, 1 *sqq.*

99. The principle of liberal construction applied 241
Knox *v.* Lee, 12 Wallace, 457 *sqq.*

100. The "necessary and proper" clause 245
Ibid.

CHAPTER XIV

CONGRESS AT WORK

101. Party organization in Congress 247
Congressional Record, XL, Part 3, 2207 *sqq.*

102. A criticism of the House of Representatives 253
Ibid., XL, Part 9, 8831 *sq.*

103. Duties of the speaker of the House 256
House Manual (1908).

104. Political significance of the speakership 257
Congressional Record, XL, Part 5, 4807 *sq.*

105. The sources of the speaker's power 260
The Arena, XXII, 657 *sqq.*

106. How the House disposes of business 262
The Independent, LXIV, 579 *sqq.*

107. Congress and presidential influence 265
Congressional Record, XLII, Part 4, 3370.

108. Departmental preparation of bills 267
Ibid., XLII, Part 1, 299.

109. Log-rolling in Congress 269
Ibid., XLII, Part 5, 4614.

110. The Senate at work 270
The Forum, XXXI, 425 *sqq.*

111. Communications between the Houses 272
Congressional Record, XXXV, Part 7, 6959.

CHAPTER XV

THE FEDERAL JUDICIARY

112. Constitutional provisions 273
The federal Constitution.

113. Power of the courts to pass on the constitutionality of federal statutes 274
Marbury *v.* Madison, 1 Cranch, 137.

PAGE

114. Power of the federal courts over state statutes 278
Martin *v.* Hunter's Lessees, 1 Cranch, 304.

115. Jefferson's criticism of the Supreme Court 281
Writings of Thomas Jefferson (1855 ed.), 133 and 192.

116. Political questions in federal cases. 283
Pollock *v.* Farmers' Loan and Trust Co., 157 United States Reports, 532 *sqq.*

117. The courts and social policy 286
Presidential Message, December 8, 1908.

118. The place of the Supreme Court in our system 288
Congressional Record, XLII, Part 1, 589.

CHAPTER XVI

FOREIGN AFFAIRS

119. The organization of the Department of State 291
Statutes at Large, I, 28.

120. Duties and responsibilities of diplomatic representatives . . 292
Smithsonian Miscellaneous Collections, III, Part 2, 117 *sqq.*

121. Expenses connected with the ambassadorial rank 295
Congressional Record, XLII, Part 6, 5575.

122. The negotiation of treaties 297
Senate Documents, 57th Congress, 1st Sess., XII, 6 *sqq.*; *Congressional Record*, XL, Part 2, 1418 *sqq.*

123. The recognition of a new government 302
J. B. Moore, *A Digest of International Law*, I, 97; *Congressional Record*, XXXVIII, Part 1, 323 *sq.*

124. An arbitration treaty 305
Supplement to the American Journal of International Law (1908), II, 298 *sq.*

CHAPTER XVII

NATIONAL DEFENSE

125. The national militia 308
United States Statutes at Large, XXVII, Part 1, 775 *sqq.*

126. The organization of the standing army 309
Statutes of the United States, 1900–01, 748.

127. The declaration of war 310
Richardson, *Presidential Messages*, X, 201.

128. The call for volunteers 310
Ibid., X, 203 *sq.*

PAGE

129. Establishment of a blockade 312
Richardson, *Presidential Messages*, X, 202 *sq.*

130. The direction of the war 313
(a) *The World's Work*, III, 1841 *sqq.*; (b) Gorham, *Life and Public Services of Edwin M. Stanton*, II, 99 *sq.*; (c) *Correspondence relating to the War with Spain*, 18 *sq.*

131. Use of troops in domestic disturbances 317
Grover Cleveland, *Presidential Problems*, 105 *sq.*

132. Use of troops in domestic disasters 318
Report of the War Department (1906), 548.

133. The American theory of national defense 320
Congressional Record, XXXIV, Part 2, 1024 *sqq.*

CHAPTER XVIII

Taxation and Finance

134. The uniformity rule applied to indirect taxes 323
Knowlton *v.* Moore, 178 United States Reports, 43 *sqq.*

135. The apportionment of direct taxes 327
United States Statutes at Large, 1859–63, 294.

136. The income tax 328
Pollock *v.* Farmers' Loan and Trust Company, 158 United States Reports, 618 *sqq.*

137. The constitutionality of the protective tariff 330
Works of John C. Calhoun, VI, 2 *sqq.*

138. Social implications of the taxing power 331
Congressional Record, XLII, Part 1, 71 *sq.*

139. Preparation of a revenue bill 333
Life and Times of Nelson Dingley, 414 *sqq.*

140. Extract from the Dingley Tariff Act 337
United States Statutes at Large, XXX, 151 *sqq.*

141. Obtaining estimates for appropriations 338
Library of Congress (Hearing on the Legislative, Executive, and Judicial Appropriation Bill, 1907), 38 *sqq.*; *Statutes of the United States*, 1900–01 (Concurrent Resolutions), 6.

142. Extract from an appropriation bill 341
Statutes of the United States, 1905–06, 389 *sqq.*

CHAPTER XIX

The Regulation of Commerce

143. Constitutional provisions 343
The federal Constitution.

PAGE

144. Judicial interpretation of the term "commerce" 343
Gibbons *v.* Ogden, 9 Wheaton, 1 *sqq.*

145. State interference with interstate commerce 348
Case of the State Freight Tax, 15 Wallace, 232 *sqq.*

146. Condition of transportation in 1885 352
Senate Report, No. 46; 49th Congress, 1st Sess.

147. The interstate commerce commission at work 356
Interstate Commerce Reports, XII, 325 *sq.*

148. The anti-trust act of 1890 358
Statutes at Large, XXVI, 209 *sq.*

CHAPTER XX

National Resources

149. The governors' conference, 1908 361
The Outing Magazine, LII, 491 *sqq.*

150. Why forest reservations should be made 364
House Reports, 59th Congress, 1st Sess., No. 4399.

151. The national forest reserves 366
The Independent, LXIV, 1374 *sqq.*

152. The reservation of mineral lands 368
Senate Document, 59th Congress, 2d Sess., No. 310.

153. The reclamation of arid lands 371
Congressional Record, XXXV, Part 8, 253 *sqq.*

CHAPTER XXI

The Government of Territories

154. Constitutional limitations on Congress in governing territories . 375
Dorr *v.* United States, 195 United States Reports, 138 *sqq.*

155. Our relations with Cuba 378
Statutes at Large, XXX, 738; *Statutes of the United States*, 1900–01, 897 *sq.*

156. Principles of American policy in the Philippines 380
Congressional Record, XXXIV, Part 1, 8 *sqq.*

157. The Philippine assembly 385
Report of the Philippine Commission, 1907, I, 213 *sqq.*

158. The organization of government in Porto Rico 388
Statutes of the United States, 1899–90, 79 *sqq.*

PART III. STATE GOVERNMENT

CHAPTER XXII

THE CONSTITUTIONAL BASIS OF STATE GOVERNMENT

PAGE

159. Federal limitations on state authorities 391
The federal Constitution.

160. The police power of the state 394
Barbier *v.* Connolly, 113 United States Reports, 27; Lawton *v.* Steele, 152 United States Reports, 133.

161. How a territory is authorized to form a constitution . . . 397
Debates of the Constitutional Convention of Utah, 1898, 3 *sqq.*

162. Suffrage qualifications in New York state 399
Extract from the New York constitution.

163. The exclusion of negroes from the suffrage 401
Extract from the Constitution of Virginia, 1902; *Journal of the Louisiana Convention*, 1898, 374 *sq.*

164. Arguments on woman's suffrage 405
Revised Record of the Constitutional Convention of New York, 1894, II, 444 *sqq.*; *Orations of George William Curtis*, I, 182 *sqq.*

CHAPTER XXIII

POPULAR CONTROL IN STATE GOVERNMENTS

165. The New York amendment system 411
Extract from the New York constitution.

166. The initiative and referendum in Oklahoma 413
Extract from the Oklahoma constitution.

167. Educating the voters in Oregon 415
Statutes of Oregon relating to Elections, 1907.

168. A public opinion bill 418
Senate Document, No. 114, 60th Congress, 1st. Sess.

169. Arguments for the initiative and referendum 419
The Arena, May and June, 1906.

170. Arguments against the initiative and referendum 424
Same as above, No. 168.

CHAPTER XXIV

THE STATE EXECUTIVE DEPARTMENT

171. The legal position of the governor 432
Field *v.* The People, 3 Illinois Reports, 79.

PAGE

172. The question of centralization in administration 436
Inaugural Address of Governor Hughes, 1909. Pamphlet.

173. The method of selecting state officers 438
Debates in the Kentucky Constitutional Convention, 1890, I, 1419 *sqq.*

174. The growth of executive influence 442
The Nation, LXXXVI, 208 *sqq.*

175. The veto power 444
Same as above, No. 173, I, 1482 *sqq.*; *Papers of Frank S. Black*, Governor of New York, 1898, I, 64.

176. The call of an extraordinary session 447
Public Papers of Governor Roosevelt, 1899, 102 *sqq.*

177. An exercise of the pardoning power 448
Ibid. (1900), 218.

178. Martial law 449
Senate Documents, 58th Congress, 3d Sess., III, 207 *sqq.*

179. Legal advice to the governor 452
Report of the Attorney-General (Iowa), 1904, 58 *sqq.*

180. Government by commission 453
Same as above, No. 164, II, 843 *sqq.*

CHAPTER XXV

The State Legislature

181. Special limitations on the legislature 457
Extracts from the New York constitution.

182. Legislative apportionment 462
Same as above, No. 164, III, 1083, 1162; IV, 34 *sqq.*

183. Legislative procedure 466
Ibid., I, 479 *sq.*

184. Problems of legislative reform 467
Report of the Commission to Recommend Changes in Methods of Legislation, New York, 1895, 7 *sqq.*

185. The legislative committee of inquiry 471
Report of the Joint Committee on Highways, New York, 1908, 1 *sqq.*

186. The legislative reference bureau 473
Review of Reviews, XXXII, 722 *sq.*

187. The evils of over-legislation 475
Report of the American Bar Association, 1906, Part 1, 383 *sqq.*

PAGE

188. Legislatures and railways 478
Same as above, No. 164, IV, 483 *sqq.*

189. The organization of a lobby 482
Testimony before the Legislative Insurance Investigating Committee of New York, II, 1925 *sqq.*

190. Legislation against corporations 484
Ibid., II, 1560 *sq.*

191. Keeping track of legislators 486
Pamphlet published by the Citizens Union, 1907.

CHAPTER XXVI

The Judicial System

192. The independence of the judiciary 488
Same as above, No. 187, for the year 1889, 272 *sqq.*

193. The judiciary as the guardian of private rights 491
Debates and Proceedings of the Maryland Constitutional Convention, 1851, II, 473 *sqq.*

194. The methods of selecting judges 492
Debates of the New York Constitutional Convention, 1846, 141 *sqq.*

195. The jury system 495
Same as above, No. 187, for the year 1898, 285 *sqq.*; same as above, No. 164, I, 798 *sq.*

196. The law's delays 500
Same as above, No. 187, for the year 1885, 323 *sqq.*

197. Corruption in the police administration 505
Report of the Senate Committee Appointed to Investigate the Police Department of the City of New York, V, 5340 *sqq.*

CHAPTER XXVII

The Organization of Municipal Government

198. Home rule for cities 509
Same as above, No. 164, II, 235 *sqq.*

199. Popular charter drafting 510
Extract from the constitution of California (amendment, 1905).

200. The New York check on the legislature 512
Extract from the New York constitution.

PAGE

201. The leading difficulties in city government 514
Testimony taken before the Senate Committee on Cities, 1890, V, 10 *sqq.*

202. Decentralized municipal administration 517
Mayors' Addresses, 1829–91 (Boston), 6 *sq.*

203. The mayor's power in New York City 519
Extract from the charter of New York City.

204. The council and municipal administration 521
Boston Finance Commission, *Final Reports* (January, 1909), 24 *sqq.*

205. A plea for the rehabilitation of the city council 526
Same as above, No. 164, II, 233 *sqq.*

206. Municipal government by commission 529
Supplement to the Code of Iowa (1907), 208 *sqq.*

207. Municipal legislative reference 533
Digest of City Charters (Hatton, A. R., editor), Chicago, 1906, 351.

CHAPTER XXVIII

Municipal Functions

208. Municipal waterworks 535
Statistics of Cities having a Population of over 30,000 (1907), Bureau of the Census, 1907, 63 *sqq.*

209. A mayor's fight for good electric light service 538
Atlantic City Conference for Good City Government (1906), 271 *sqq.*

210. Work of a tenement house department 540
First Report of the Tenement House Department of the City of New York, 1902–03, I, 5 *sq.*

211. The health department of a city 543
Report of the Public Health Department (Cleveland, Ohio, 1906).

212. Municipal parks 545
Annual Report of the Board of Public Service: Division of Parks (Cleveland, Ohio, 1906).

213. The question of municipal ownership 548
Municipal and Private Operation of Public Utilities (Report to the National Civic Federation), I, 23 *sqq.*

214. The case for municipal ownership 549
Parsons, *The City for the People*, 221 *sqq.*

PAGE

215. Politics and public utilities 552
Same as above, No. 213, I, 89 *sqq.*

216. The labor problem in a city department 554
Waring, G. E., *Street-Cleaning* (1897), 25 *sq.*

CHAPTER XXIX

LOCAL GOVERNMENT

217. The New England town meeting 556
From the official leaflets.

218. The Indiana township 560
Horner, F. A., *The Revised Statutes of Indiana*, II, Secs. 6000 *sqq.*

219. The county council 561
Ibid., Secs. 5730 *sqq.*

220. Centralization of administrative supervision 563
Public Papers of Theodore Roosevelt, Governor, 1899, 193.

221. Central control of local finance 565
Bates, C., *The Annotated Revised Statutes of Ohio* (1905), I, 114 *sqq.*

CHAPTER XXX

POLITICS AND GOVERNMENT

222. The operations of a municipal boss 567
Investigation of the Offices and Departments of the City of New York, 1899, I, 326 *sq.*, 454 *sq.*; III, 2963 *sqq.*

223. Corporations in politics 572
Senate Reports, 53d Congress, 2d Sess., X, 655 *sqq.*

224. Office holders in politics 578
Parker, G. F., *Writings of Grover Cleveland*, 49 *sq.*

225. An assembly district leader at work 579
New York *Evening Post*, December 14, 1907.

226. Charity in Tammany politics 581
New York *Times*, September 1, 1908; February 7, 1908.

227. Some primitive election devices 584
National Conference on Practical Reform of Primary Elections (1898), 126 *sqq.*

228. State control of party organization 586
Extract from the *Election Law of Illinois*, 1908.

CHAPTER XXXI

Taxation and Finance

PAGE

229. The problem of assessing property 590
Report of the Minnesota Tax Commission, 1908, 20 *sq.*

230. Separation of state and local revenues 592
Ibid., 203 *sqq.*

231. Taxation of personal property 597
Ibid., 30 *sqq.*; *Report of the Special Tax Commission of New York*, 1907, 57 *sq.*

232. The inheritance tax 603
Report of the Wisconsin Tax Commission, 1903, 59 *sqq.*

CHAPTER XXXII

Social and Economic Legislation

233. The spirit of opposition to corporations. 606
Same as above, No. 164, IV, 1068 *sqq.*

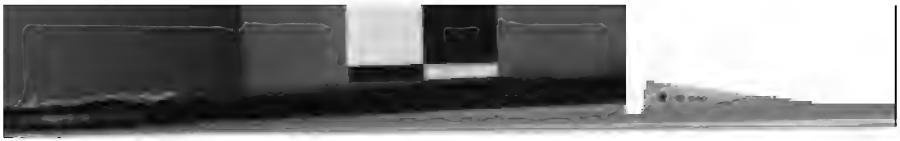
234. Control of railways by commission 609
Extract from the constitution of Oklahoma.

235. The operations of a railway commission 612
Report of the North Carolina Corporation Commission, 1907, 1 *sqq.*

236. Control of state regulation by the federal judiciary 614
Chicago, etc. Railway Company *v.* Minnesota, 134 United States Reports, 418.

237. The Supreme Court and labor legislation 617
Lockner *v.* New York, 198 United States Reports, 75.

Index 621



PART I

HISTORICAL INTRODUCTION

CHAPTER I

COLONIAL ORIGINS OF AMERICAN INSTITUTIONS

American institutions based on experience, not on theories.

THERE is a lingering tradition in the United States that the men of the eighteenth century who laid the foundations of our system of government broke violently from political experience and sought their guidance in the abstract principles of the rights of man. As a matter of fact, however, the Revolutionary Fathers had no quarrel with the fundamental English institutions under which they lived; their revolt was against the colonial policy of the British government, — a protest against definite measures which affected them adversely, not a demand for the realization of the equalitarian notions enunciated in the Declaration of Independence, which served very well to justify the Revolution, but afforded no practical basis for the reconstruction of the political system after British dominion was thrown off. Neither in the creation of the state governments nor in the formation of the Union did the Fathers depart very radically from experience, and even their departures were reactions against concrete abuses rather than attempts at ideal creations. With governors, councils, legislatures, judicial systems, municipal and local governments, and their operations under American conditions, they were familiar; and as most of them were staid and conservative men, well schooled in the actual management of public business, they had neither interest nor desire to lead them into experiments in theoretical politics. The sources of American government, therefore, are to be sought not in the realms of political philosophy, but in the dry records which describe the institutional heritage with which the new nation began its career of independence.

On the eve of the Revolution, the American colonies fell into three general groups, according to the customary classification:

royal, corporate, and proprietary. The governments of all of them, however, were based on written documents issued by the English crown and limited by them as well as by statutes passed by Parliament from time to time. The general outlines for the government of the royal province, for example, were laid down in the governor's commission, of which the following, issued by George III for New Hampshire, may be taken as typical:—

1. *The Royal Province* *

George the Third by the Grace of God of Great Britain, France, and Ireland, King, Defender of the Faith & so forth.

To our Trusty and well beloved Benning Wentworth Esquire, Greeting:

Know you, That Wee, reposing especial Trust and Confidence in the Prudence, Courage and Loyalty of you Benning Wentworth, of our Especial grace, certain Knowledge and meer motion, Have thought fit to constitute and appoint you . . . the said Benning Wentworth to be our Governour and Commander-in-chief of our province of New Hampshire within our Dominion of New England in America . . . with all & singular the Powers and Authoritys hereby granted you for and during our will and Pleasure:

The governor to have general executive power.

And We do hereby require & Command you to do & Execute all things in due manner that shall belong unto your said Command and the Trust we have reposed in you according to the several Powers and Directions granted or appointed you by this Present Commission and the Instructions & Authorities herewith given or by such further Powers, Instructions, and Authorities as shall at any time be granted or appointed you under our signet & sign manual or by our Order in our Privy Council & according to such reasonable Laws and Statutes as now are in force or hereafter shall be made & agreed upon by you with the advice & consent of our Council & the Assembly of our said Province and Plantation under your Government, in such manner & form as is hereafter expressed.

The governor' council.

And wee do hereby give & grant unto you full Power and authority to suspend any of the members of our said Council from sitting, Voting & assisting therein, if you shall find just cause for so doing: and if it shall at any time happen that by the Death, Departure out of our said Province, suspension of any of our said Councillors, or otherwise there shall be a Vacancy in our said Council, any three whereof we do hereby appoint to be a Quorum, our Will & Pleasure is that you signify the same to us by the first opportunity, that wee may under our signet and sign manual constitute & appoint others in their stead; but that our affairs at that Distance may not suffer for want of a due number of Councillors, if ever it shall happen that there shall be less than seven of them residing in our said Province, Wee do hereby give & grant unto you the said Benning Wentworth full Power & Authority to choose as many Persons out of the Principal Freeholders Inhabitants thereof as will make up the full Number of our said Council to be seven & no more, which persons so chosen & appointed by you shall be to all intents & Purposes Councillors in our said Province until either they shall be confirmed by us or that by the nomination of others by us under our sign manual & signet our Council shall have seven or more Persons in it:

Governor and coun empowere to call an assembly.

And wee do hereby give & grant unto you full Power & Authority with the advice & consent of our said Council from time to time as need shall require to summon & call General Assemblys of the said Freeholders & Planters within your Government in manner & form according to the usage of our Province of New Hampshire:

The governor, cou cil, and as sembly may make laws.

Wee do hereby Declare that the Persons so elected & qualified shall be called & Deemed the General Assembly of that our said Province & Plantation and that you the said Benning Wentworth with the consent of our said Council & Assembly or the major part of them respectively shall have full Power & Authority to make Constitute and ordain Laws, Statutes and Ordinances for the Publick Peace, Welfare and good Government of our said Province & of the People & Inhabitants thereof, and such others

as shall resort thereto, and for the Benefit of us our Heirs & Successors, which said Laws, Statutes & ordinances are not to be repugnant, but as near as may be agreeable to the laws & Statutes of this our Kingdom of Great Britain.

to be nitted yal val.

Provided that all such Statutes & ordinances of what nature & Duration soever be within three months or sooner after the making thereof transmitted unto us under our Publick Seal of New Hampshire for our approbation or Disallowance of the same, as also Duplicates thereof by the next conveyance, and in case any or all of the said Laws Statutes & ordinances not before confirmed by us shall at any time be disallowed & not approved & so signified by us our Heirs or successors under our or their sign manual & signet or by order of our or their privy Council unto you the said Benning Wentworth or to the Commander-in-Chief of our said province for the time being, then such & so many of the said Laws Statutes & ordinances as shall be so disallowed and not approved, shall from thence cease, Determine & become utterly void, & of none effect, any thing to the contrary thereof notwithstanding.

nor's ower.

And to the End that nothing may be passed or done by our said Council or Assembly to the Prejudice of us our Heirs & Successors We will & ordain that you the said Benning Wentworth shall have & enjoy a negative Voice in the making & Passing of all Laws & Statutes & ordinances as aforesaid, and you shall and may likewise from time to time as you shall judge it necessary, adjourn, Prorogue & Dissolve all General Assemblies as aforesaid. Our further Will & Pleasure is, that you shall and may keep and use the Publick Seal of our Province of New Hampshire for sealing all things whatsoever that Pass the Great Seal of our said Province under your Government.

ip- nent lges.

And We do hereby authorize and empower you to constitute and appoint Judges and in cases requisite Commissioners of Oyer and Terminer, Justices of the Peace and other necessary officers and ministers in our said Province for the better administration of Justice and putting the Laws in execution, and to administer

or cause to be administered unto them such oath or oaths as are usually given for the due execution and Performance of offices and Places and for the clearing of Truth in Judicial Causes.

The granting of pardon and reprieves.

And we do hereby give and grant unto you full Power and authority where you shall see cause or shall Judge any offender or offenders in criminal matters or for any Fines or Forfeitures due unto us fit objects for our mercy to Pardon all such offender or offenders, and to remit all such fines and forfeitures, Treason and Willfull murder only excepted, in which cases you shall likewise have Power upon extraordinary occasions to grant reprieves to the offenders until and to the Intent our royal Pleasure may be known therein.

The governor military command

And We do hereby give and grant unto you the said Benning Wentworth by yourself or by your Captains and Commanders by you to be authorized, full Power and authority to Levy, arm, muster, command and Employ all persons whatsoever residing within our said Province & Plantations, and as occasion shall serve to march from one place to another or to embark them for the resisting and withstanding of all Enemies, Pyrates & rebels both at Land and Sea, and to transport such forces to any of our Plantations in America if necessity shall require for the Defence of the same against the Invasions or attempts of any of our Enemies, and such Enemies, Pirates and rebels, if there shall be occasion to pursue and prosecute in or out of the limits of our said Province & Plantation or any of them, and if it shall so Please God, them to vanquish, apprehend and take, and being taken according to Law to put to Death, or keep or Preserve alive at your discretion, and to Execute martial Law in time of Invasion or other times, when by Law it may be executed, and to do and execute all and every other thing and things which to our Commander-in-Chief doth or ought of right to belong.

The governor appoint naval officers.

Forasmuch as mutinies & Disorders may happen by persons Employed at sea during the time of war, and to the End that such persons as shall be shipped & Employed at sea during the time of war, may be the better governed and ordered, We do hereby

give and grant unto you the said Benning Wentworth our Governor and Commander-in-Chief full Power & authority to constitute and appoint Captains, Lieutenants, masters of ships & other Commanders & officers, Commissions to Execute the Law martial, & to use such Proceedings, authorities, Punishments, Corrections and Executions upon any offender or offenders which shall be seditious, mutinous, Disorderly or any way unruly either at sea or during the time of their abode or residence in any of the Ports Harbours or Bays of our said Province or Territories as the case shall be found to require, according to the martial Law and the said Directions during the time of War as aforesaid.

visions
ase of
death or
ence
he
ernor.

And We do hereby command all officers and ministers civil & military and all other Inhabitants of our said Province to be obedient aiding and assisting unto you the said Benning Wentworth in the Execution of this our Commission and of the Powers and authorities herein contained, and in case of your Death or absence out of said Province unto such person as shall be appointed by us to be our Lieutenant Governor or Commander in Chief of our said Province to whom we do therefore by these Presents give and grant all & singular the Powers and authorities aforesaid to be executed & enjoyed by him during our Pleasure or until you return to our said Province; and, If upon your Death or absence out of said Province of New Hampshire there be no Person upon the place Commissionated or appointed by us to be our Lieutenant Governor or Commander in chief of our said Province, our Will & Pleasure is that the Eldest Councillor whose Name is first placed in our said Instructions to you, and who shall be at the time of your death or absence residing within our said Province, shall take upon him the administration of the Government and Execute our said Commission and Instructions and the several Powers and authorities therein contained.

2. *The Corporate Colony*

The second type of American colony was a company of men formed into a body corporate by a royal charter and authorized

to set up a government, admit new members, and conduct their local affairs with a large degree of freedom. The following extract from a charter of Rhode Island and Providence Plantations gives the most important part of the document dealing with the form of government: —

Charles the Second, by the grace of God, King of England, Scotland, France and Ireland, Defender of the Faith, &c., to all to whome these presents shall come, greeting: . . .

Certain men constituted a body corporate.

And accordingly our will and pleasure is, and of our especiall grace, certaine knowledge, and meere motion, wee have ordeyned, constituted and declared, and by these presents, for us, our heires and successors, doe ordeyn, constitute and declare, That they, the sayd William Brenton, William Codington, Nicholas Easton, Benedict Arnold, William Boulston, &c. . . . and all such others as now are, or hereafter shall bee admitted and made ffree of the company and society of our collonie of Providence Plantations, in the Narragansett Bay in New England, shall bee, from tyme to tyme, and forever hereafter, a bodie corporate and politique, in ffact and name, by the name of The Governor and Company of the English Colony of Rhode Island and Providence Plantations, in New England, in America; and that by the same name, they and their successours shall and may have perpetuall succession, and shall and may bee persons able and capable, in the lawe, to sue and bee sued, to pleade and be impleaded, to answeare and be answeared unto, to defend and to be defended, in all and singular suites, causes, quarrels, matters, actions and thinges, of whatever kind or nature soever; and alsoe to have, take, possesse, acquire, and purchase lands, tenements, or hereditaments, or any goods or chattels, and the same to lease, graunt, demise, aliene, bargaine, sell, and dispose of, at their owne will and pleasure, as other our liege people of this our realme of England, or anie corporation or bodie politique within the same may lawfully doe.

The governor and assistants.

And further, wee will and ordeyne, and by these presents, for us, oure heires, and successours, doe declare and appoynt that for the better ordering and managing of the affaires and business of

the sayd Company, and theire successours, there shall bee one Governour, one Deputie-Governour and ten Assistants, to bee, from tyme to tyme, constituted, elected, and chosen, out of the freemen of the sayd Company, for the tyme beinge, in such manner and fforme as is hereafter in these presents expressed; which sayd officers shall aplye themselves to take care for the best disposeinge and orderinge of the generall businesse and affaires of, and concerninge the landes and hereditaments hereinafter mentioned, to be graunted and the plantation thereof, and the government of the people there. . . .

The general assembly.

And further, wee doe, of our especiall grace, certayne knowledge, and meere motion, give and graunt unto the sayd Governour and Company . . . and their successours that the Governour, or in his absence, or by his permission, the Deputy Governour of the sayd Company, for the tyme being, the Assistants, and such of the ffreemen of the sayd Company as shall bee soe as aforesayd elected or deputed, or soe many of them as shall bee present att such meetinge or assemblye as afforesayde, shall bee called the Generall Assemblye.

Powers of the assembly.

And that they or the greatest parte of them present, whereof the Governour or Deputy Governour, and sixe of the Assistants, at least to be seven, shall have and have, and hereby given and graunted unto them, ffull power authority, ffrom tyme to tyme, and at all tymes hereafter, to appoynt, alter, and change such dayes, tymes and places of meetinge and Generall Assemblyee, as theye shall think ffit; and to choose, nominate, and appoynt, such and soe manye other persons as they shall thinke fitt, and shall be willing to accept the same, to bee ffree of the sayd Company and body politique and them into the same to admitt; and to elect and constitute such offices and officers, and to graunt such needful commissions as they shall thinke ffitt and requisite, ffor the ordering, managing, and dispatching of the affaires of the sayd Governour and Company, and their successours; and from tyme to tyme, to make, ordeyne, constitute or repeal such lawes, statutes, orders and ordinances, fformes and ceremonies of

government and magistracye, as to them shall seeme meete for the good and wellfare of the sayd Company, and ffor the government and ordering of the landes and hereditaments hereinafter mentioned to be graunted, and of the people that doe, or att any tyme hereafter shall, inhabitt or bee within the same; soe as such lawes, ordinances, and constitutiones, soe made, bee not contrary and repugnant unto, butt as neare as may bee, agreeable to the lawes of this our realme of England, considering the nature and constitutione of the place and people there.

3. *The Proprietary Colony*

The government of a proprietary colony was based, in the first instance, upon letters patent issued to some person by the king granting the possession of a certain tract of land and conferring extensive power in making laws and governing the inhabitants. On such conditions, Pennsylvania was granted to William Penn by Charles II, but in 1701 Penn conferred upon the inhabitants of his province, with the assent of a general assembly, a charter establishing certain civil rights and a frame of government. This system remained in force until the Revolution.

William Penn, Proprietary and Governor of the Province of Pensilvania and Territories thereunto belonging, To all to whom these Presents shall come, sendeth Greeting. Whereas King Charles the Second, by His Letters Patents, under the Great Seal of England, bearing Date the Fourth Day of March, in the Year One Thousand Six Hundred and Eighty-one, was graciously pleased to give, and grant unto me, and my Heirs and Assigns forever, this Province of Pensilvania, with divers great Powers and Jurisdictions for the well Government thereof. . . . Know Ye Therefore, That for the further Well-being and good Government of the said Province and Territories; and in Pursuance of the Rights and Powers before mentioned, I the said William Penn do declare, grant and confirm unto all the Freemen, Planters, and Adventurers, and other Inhabitants of this Province and Territories, these following Liberties, Franchises, and Privileges,

so far as within me lieth, to be held, enjoyed, and kept . . . forever.

Religious liberty.

First. Because no People can be truly happy, though under the greatest Enjoyment of Civil Liberties, if abridged of the Freedom of their Consciences, as to their Religious Profession and Worship: And Almighty God being the only Lord of Conscience, Father of Lights and Spirits; and the Author as well as Object of all divine knowledge, Faith, and Worship, who only doth enlighten the Minds, and persuade and convince the Understandings of People, I do hereby grant and declare, That no Person or Persons, inhabiting this Province or Territories, who shall confess and acknowledge *One* almighty God, the Creator, Upholder and Ruler of the World; and profess him or themselves obliged to live quietly under the Civil Government, shall be in any case molested or prejudiced, in his or their Person or Estate, because of his or their conscientious Persuasion or Practice, nor be compelled to frequent or maintain any religious Worship, Place or Ministry, contrary to his or their Mind, or do or suffer any other Act or Thing, contrary to their religious Persuasion. And that all Persons who also profess to believe in Jesus Christ, the Saviour of the World, shall be capable (notwithstanding their other Persuasions and Practices in Point of Conscience and Religion) to serve this government in any Capacity both legislatively and executively, he or they solemnly promising, when lawfully required, Allegiance to the King as Sovereign and Fidelity to the Proprietary and Governor and taking the Attests as now established by the Law. . . .

The election of a legislature.

II. For the well governing of this Province and Territories, there shall be an Assembly yearly chosen, by the Freemen thereof, to consist of four Persons out of each County, of most Note for Virtue, Wisdom, and Ability, (or of a greater number at any Time, as the Governor and Assembly shall agree) upon the First Day of October forever. . . . Which Assembly shall have Power to chuse a Speaker and other their Officers; and shall be Judges of the Qualifications and Elections of their own Members; sit upon their own Adjournments; appoint Committees; prepare Bills

in order to pass into Laws; impeach Criminals, and redress Grievances; and shall have all other Powers and Privileges of an Assembly, according to the Rights of the free-born Subjects of England, and as is usual in any of the King's Plantations in America. . . .

III. That the Freemen in each respective County at the Time and Place of Meeting for Electing their Representatives to serve in Assembly, may as often as there shall be Occasion, chuse a double number of Persons to present to the Governor for Sheriffs and Coroners to serve for three Years, if so long they behave themselves well; out of which respective Elections and Presentments, the Governor shall nominate and commissionate one for each of the said Offices. . . .

The selection of local officers.

4. *A Boston Town Meeting*

While the colonies presented many points of similarity in the organization of their central governments, there was great diversity in the methods of conducting local affairs. In New England, the conditions of the early settlement, the topography of the country, and the prevailing modes of agriculture led to the formation of the compact town as the unit of local government; and the spirit of equality among the freeholders brought about a popular control of local affairs through the historic "town meeting." The extract from the minutes of a Boston town meeting given below illustrates the methods and spirit of the system.

At a Meeting of the Freeholders and other Inhabitants of the Town of Boston legally qualify'd and Warned in the Public Town Meeting Assembled at Fanueil-Hall on Monday the 13th day of March A.D. 1758.

Prayer was made by the Rev^{d}. M^{r}. Saml. Checkley S^{r}.

The Warrant for calling the Meeting. Read.

Sundray Laws. Read.

John Phillips Esqr. was chose Moderator of this Meeting. . . .

Ezekiel Goldthwait was Chose Town Clerk for the Year ensuing. . . .

Sundry Petitions. Read.

The Town proceeded to the Choice of seven Selectmen & the Votes brought in & Sorted, it appeared that,

Samuel Grant Esq[r].
Mr. Thomas Hill
[and five others]

were unanimously chose. [Here follow elections of Overseers of the Poor, Firewards, Town Treasurer, Clerks of the Market, Fence Viewers, Hogreeves, Scavengers, and other officers.[1]]

. . . Tuesday Morning ten o'clock the Town Mett according to Adjournment. . . . The Town took into Consideration the Method of raising Monies for the payment of Schoolmasters, for the Relief of the Poor, and the defreying other necessary Charges, and after a very long debate thereon. Voted that the Sum of Money that shall be agreed upon to be raised at this Meeting for the purposes aforesaid, shall, as soon as may be, be apportion'd by the Assessors, and the Collectors of Taxes shall upon receiving said Assessments from them, forthwith Collect and pay the same into the Town Treasury, & that no more than six pense on the Pound be allow'd for Collecting of Taxes. Voted that the Sum of Six Thousand Pounds Lawful Money be rais'd by a Tax upon Polls and Estates within this Town for Relief of the Poor, and defreying other necessary Charges arising within the Town the Year ensuing.

. . . Voted that the Town proceed to the Choice of four Collectors of Taxes, the Vote passed this Meeting for choosing only

[1] It will be noted that according to the formal law the municipal officers of Boston were to be elected in open town meeting. The following extract from John Adams's Journal is an interesting illustration of the political practice: "This day learned that the Caucus club meets at certain times in the garret of Tom Dawes, the adjutant of the Boston regiment. He has a large house and he has a movable partition in the garret which he takes down and the whole club meets in one room. There they smoke tobacco until you cannot see from one end of the garret to the other. There they drink flip, I suppose, and they choose a moderator who puts questions to the vote regularly; and selectmen, assessors, collectors, fire-wards, and representatives are regularly chosen before they are chosen in the town." — John Adams, *Works* (1850), Vol. II, p. 144.

two notwithstanding, accordingly the Votes were brought in, and upon Sorting them it appeared that,

Messrs. John Ruddock
James Scutt
Jonathan Payson &
Samuel Adams,

were chose Collectors of Taxes for the Year ensuing. . . .

Petitions considered.

Petition of sundry Inhabitants praying that the Town would pave the lower end of Prince Street leading to Charlestown Ferry, for reasons therein mentioned, was Read, and after a short debate, Voted that said Petition be dismiss'd. The Petition of the Watchmen of the Town praying for an Addition to their Wages, for reasons therein mentioned was Read, Voted that said Petition be dismiss'd. . . .

5. *Local Government in Virginia*

In the South, on the other hand, the physiographical conditions favored the formation of scattered settlements and the establishment of the county as the principal unit of local government. In the county, the justices of the peace, after the fashion of England, conducted the administrative as well as the judicial business. Adopting the more highly centralized system of the mother country, where the justices were appointed by the crown, the Virginia legislature vested the appointment in the governor of the colony. Some of the features of Southern local government are well described in the lengthy statutes from which the extracts given here are taken: —

Justices of the peace appointed by the governor.

For the better and more expeditious determination of controversies, Be it enacted by the Lieutenant-Governor, Council, and Burgesses, of this present General Assembly, and it is hereby enacted by the authority of the same, That in every county of this dominion, a monthly court shall be held, by the justices thereof, at the several respective places already assigned for that purpose, or at such place or places as shall be hereafter lawfully appointed, upon the days hereinafter limited for each county respectively,

and at no other time or place: Which courts shall be called county courts, and consist of eight or more justices of the peace, commissionated by the governor or commander in chief of this dominion, for the time being: Any four of them, one being of the quorum, shall be sufficient to hear and determine all causes depending in the said county courts.

ustices
build
ils.

And be it further enacted, by the authority aforesaid, That from time to time, for ever hereafter, the court of every county of this dominion, shall cause to be erected, and kept in good repair, or where the same shall be already built, shall maintain and keep in good repair, within each respective county, and at the charge of such county, one good and convenient courthouse, of stone, brick, or timber, and one common gaol, and county prison, well secured with iron bars, bolts, and locks, and also, one pillory, whipping-post, and stocks; and where land shall not be already provided and appropriated for that purpose, such court may purchase two acres, whereon to erect the said public buildings, for the use of their county, and for no other use whatsoever.

ustices to
dminister
ocal im-
rovements.

Be it therefore enacted, by the Lieutenant Governor, Council, and Burgesses of this present General Assembly, and it is hereby enacted, by the authority of the same, That the justices of every county court in this colony, be, and are hereby authorized and impowered, to contract and agree for the building of bridges, making causeways, and other necessary charges, in such manner as to them shall seem most proper; and to levy the expence thereof, at such times, and in such proportions, as they shall think most for the ease and benefit of the people. And all and every contracts, agreements, and orders, by them made, from time to time, concerning the same, shall be good, binding, and available, against themselves, and their successors, and all other persons whatsoever.

6. *Political Theory before the Revolution* *

bsence
f political
heorizing.

Political theorizing in America before the breach with Great Britain stands in marked contrast to the intellectual ferment which

preceded the French Revolution. The reason for this is not far to seek; the American Revolution was not an internal social reconstruction, but the abolition of external coercion. There was accordingly no discussion of the rights of man, no leveling propaganda, no discontent with the general features of the prevailing system of government. The following extract from a sermon preached in 1765 before the Massachusetts Governor, Council, and House of Representatives, on the occasion of the election of the Council, doubtless represents the attitude toward the government which existed quite generally throughout the colonies.

British government perhaps the most perfect form.

In Great Britain there is a happy mixture of monarchy, aristocracy, and democracy. This is perhaps the most perfect form of civil government. It is the glory of Britons, and the envy of foreigners. How happy is Great Britain in a Prince who accounts it his glory to reign over a free people, and who, we trust, will always make the laws of the land the rule of his administration! How still more happy, in a constitution that scarce admits of tyranny, unless the people themselves become corrupt and venal; and when that is the case, nothing but Omnipotence can save them.

Hereditary monarchy the safety of Great Britain.

It is the safety of the British nation that the monarchy is hereditary, as that right is now understood. It is a favor of heaven that our lawful Sovereign is possessed of virtues which ensure him the love and obedience of his subjects. "Because the Lord hath loved his people, he hath made thee a king over them." May that kind Providence which has so often appeared for our nation, still watch over it for good; disappoint every attempt to subvert their liberties, and preserve them from those internal vices and corruptions which they have more reason to fear than any foreign enemy or open violence!

Government of Massachusetts modeled after that of England.

The form of government in this Province, is a model of the British constitution. Our commander in chief, who represents the king is not elected by ourselves. We do not complain of this as an infringement of our liberties; it rather frees us from many inconveniences which would attend frequent popular elections. Especially may we esteem it a privilege, while we have a Gentleman at our head, who so well understands our civil constitution,

and who, we persuade ourselves, sincerely aims at the happiness of the people he is appointed to govern. May his Excellency's services for the public always find acceptance with an obliged and grateful people; and may he have the approbation of his great Lord when he gives an account of the talents committed to him!

popu-
ɔranch
ıe
ɪrnment.

The other branches of our legislature are chose by ourselves. It refreshes our hearts to see the return of this anniversary and we hope fills them with thankfulness to God. The presence of our General Assembly and the business of this day, put us in mind of the liberties we enjoy, while more than nine-tenths of mankind are in the most abject slavery, and multitudes of them, to the basest and worst of the human race. We conclude it is from the experience their constituents have had of their wisdom and integrity, that so many are returned to serve in the present assembly who have formerly had a seat there. We cannot think the people are yet so corrupt as generally to be influenced in their elections by other considerations. We trust that they, whom they have honored with this mark of their confidence, will have a sacred regard to their interest and will not suffer any sinister views to bias or govern them.

CHAPTER II

UNION, INDEPENDENCE, AND SELF-GOVERNMENT

How the revolutionists got possession of the government.

IT is only by a study of the process through which the thirteen colonies became thirteen independent confederated states that one can hope to understand the general features of our federal system. The first fact to note is that the American Revolution was primarily the work of an active and determined group of men in each community who organized themselves first into committees of correspondence for stirring up and sustaining the fervor of revolt, and then, as the quarrel grew apace, seized the institutions of government which they found at hand, or constructed new instruments of their own. Boston led the way in the establishment of committees of correspondence by a resolution setting up a committee for that city, and this example was speedily followed by other towns. The colonial assemblies then began, in a somewhat irregular fashion, to appoint committees to represent the colonies as political units, and thus the organized basis of the new nation was laid.

7. *The Boston Committee of Correspondence, 1772*

RESOLVED as the opinion of the Inhabitants of this Town that they have ever had, and ought to have a right to Petition the King or his Representatives for the Redress of such Grievances as they feel or for preventing of such as they have reason to apprehend, and to communicate their Sentiment to other Towns.

The work of the correspondence committee.

It was then moved by Mr. Samuel Adams, That a Committee of Correspondence be appointed to consist of twenty-one Persons — to state the Rights of the Colonists and of this Province in particular, as Men, as Christians, and as Subjects; to communicate and publish the same to the several Towns in this Province and to the World as the sense of this Town, with the Infringements

and Violations thereof that have been, or from time to time may be made — Also requesting of each Town a free communication of their Sentiments on this Subject — And the Question being accordingly put — Passed in the Affirmative. *Nem. Cont.* . . .

8. *Massachusetts Calls the First Continental Congress*

The committees of correspondence were not slow in realizing the necessity of a strong union among the revolutionary forces of all the colonies in order to resist the authority of Great Britain, and in 1774 the Massachusetts House of Representatives, defying the governor's messenger who was knocking at the door to announce a dissolution, passed a resolution calling a congress of colonial representatives to meet at Philadelphia on September 1.

In the House of Representatives, June 17, 1774.

This House having duly considered, and being deeply affected with the unhappy differences which have long subsisted, and are increasing, between Great Britain and the American Colonies, do resolve, that a meeting of Committees, from the several Colonies on this Continent is highly expedient and necessary, to consult upon the present state of the Colonies, and the miseries, to which they are, and must be reduced, by the operation of certain Acts of Parliament respecting America; and to deliberate and determine upon wise and proper measures to be by them recommended to all the Colonies, for the recovery and establishment of their just rights and liberties, civil and religious, and the restoration of union and harmony between Great Britain and the Colonies, most ardently desired by all good men.

Therefore, resolved, That the Honourable James Bowdoin, Esq., the Honourable Thomas Cushing, Esq., Mr. Samuel Adams, John Adams, and Robert Treat Paine, Esquires, be and they are hereby appointed a Committee on the part of this province, for the purposes aforesaid, any three of whom to be a quorum, to meet such Committees or Delegations from the other Colonies, as have been or may be appointed, either by their respective

Houses of Burgesses or Representatives, or by Convention, or by the Committees of Correspondence appointed by the respective Houses of Assembly, to meet in the City of Philadelphia, or any other place that shall be adjudged most suitable by the Committee on the first day of September next; and that the Speaker of the House be directed, in a letter to the Speakers of the Houses of Burgesses or Representatives in the several Colonies, to inform them of the substance of these resolves.

9. *Appointment of the South Carolina Delegates to the First Continental Congress*

The call of Massachusetts is answered.

The other colonies met the call of Massachusetts by appointing delegates to the general conference, and thus originated the union out of which the present American nation has grown. No uniform method was followed by the discontented leaders in selecting their delegates, but the spirit of the movement for union is revealed in the document recording the action of South Carolina in choosing her representatives. It will be noted that it was merely a ratification of the steps taken by an irregular general meeting of the inhabitants held a few weeks earlier.

The delegates to secure a redress of grievances.

In the commons, house of Assembly, Tuesday, the 2d day of August 1774. Colonel Power acquainted the house, that during the recess of this house, viz: on the 6th, 7th & 8th days of July last at a general meeting of the inhabitants of this colony, they having under consideration the acts of parliament lately passed with regard to the port of Boston and Colony of Massachusetts Bay as well as other American grievances, had nominated and appointed the hon^ble^. Henry Middleton, John Rutledge, Thomas Lynch, Christopher Gadsden, & Edward Rutledge, Esqre. deputies on the part and behalf of this Colony, to meet the deputies of the other Colonies of North America, in general Congress, the first Monday in September next at Philadelphia, or at any other time or place that may be generally agreed on, there to consider the acts lately passed, and bills depending in parliament with regard to the port of Boston and Colony of Massachusetts-Bay,

which acts & bills in the precedent and consequences affect the whole Continent of America — also the grievances under which America labours by reason of the several acts of parliament that impose taxes or duties for raising a revenue, and lay unnecessary restraints and burdens on Trade; and of the statutes, parliamentary acts, and royal instructions, which make an invidious distinction between his majesty's subjects in Great Britain and America, with full power and authority to concert, agree to, and effectually prosecute such legal measures, as in the opinion of the said deputies, and of the deputies so to be assembled, shall be most likely to obtain a repeal of the said acts, and a redress of those grievances: and thereupon moved that this house do resolve to recognize, ratify, and confirm said appointment of the deputies for the purposes aforesaid.

Resolved, N. C. D. That this house do recognize, ratify, and confirm the appointment of the said deputies for the purposes mentioned in the said motion.

Attested,

THOMAS FARR,

Junr. Clerk.

10. *The Declaration of Independence*

The first Continental Congress failed to achieve anything by negotiations with Great Britain. A second was called in 1775, and after what purported to be attempts at reconciliation with the mother country, it declared the thirteen United Colonies to be forever independent. The famous document announcing the momentous decision of the Congress has the highest historical and political value. In addition to setting forth the colonists' views of their grievances, it enunciated significant democratic doctrines entertained by Jefferson and a few of the other radical leaders. Though these doctrines were not accepted by the more conservative statesmen, like Washington, Hamilton, and Gouverneur Morris, they were destined to give a new direction to political theorizing in America.

In Congress, July 4, 1776.

The unanimous Declaration of the thirteen united states of America

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

The Rights of Man.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security. — Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in

direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

ecific evances inst eat itain.

He has refused his assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature — a right inestimable to them, and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved representative houses repeatedly, for opposing, with manly firmness, his invasions on the rights of the people.

He has refused, for a long time after such dissolutions, to cause others to be elected, whereby the legislative powers, incapable of annihilation, have returned to the people at large for their exercise; the State remaining, in the mean time, exposed to all the dangers of invasions from without, and convulsions within.

He has endeavored to prevent the population of these States; for that purpose obstructing the laws for the naturalization of foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new appropriations of lands.

He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers.

He has made judges dependent on his will alone for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of new offices, and sent hither swarms of officers to harass our people and eat out their substance.

He has kept among us in times of peace, standing armies, without the consent of our Legislatures.

He has affected to render the military independent of, and superior to, the civil power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation:

For quartering large bodies of armed troops among us;

For protecting them, by a mock trial, from punishment for any murders which they should commit on the inhabitants of these States;

For cutting off our trade with all parts of the world;

For imposing taxes on us without our consent;

For depriving us, in many cases, of the benefits of trial by jury;

For transporting us beyond seas, to be tried for pretended offenses;

For abolishing the free system of English laws in a neighboring province, establishing therein an arbitrary government, and enlarging its boundaries, so as to render it at once an example and fit instrument for introducing the same absolute rule into these colonies;

For taking away our charters, abolishing our most valuable laws, and altering, fundamentally, the forms of our governments;

For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated government here, by declaring us out of his protection, and waging war against us.

He has plundered our seas, ravaged our coasts, burned our towns, and destroyed the lives of our people.

He is at this time transporting large armies of foreign mercenaries to complete the works of death, desolation and tyranny, already begun with circumstances of cruelty and perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the head of a civilized nation.

He has constrained our fellow-citizens, taken captive on the high seas, to bear arms against their country, to become the exe-

cutioners of their friends and brethren, or to fall themselves by their hands.

He has excited domestic insurrection among us, and has endeavored to bring on the inhabitants of our frontiers the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes, and conditions.

In every stage of these oppressions we have petitioned for redress in the most humble terms; our repeated petitions have been answered only by repeated injury. A prince whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.

Nor have we been wanting in our attentions to our British brethren. We have warned them, from time to time, of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity; and we have conjured them, by the ties of our common kindred, to disavow these usurpations, which would inevitably interrupt our connections and correspondence. They, too, have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity which denounces our separation, and hold them, as we hold the rest of mankind, enemies in war, in peace friends.

We, therefore, the Representatives of the United States of America, in General Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.

And for the support of this Declaration, with a firm reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

JOHN HANCOCK.[1]

11. *The Articles of Confederation*

How the Articles were adopted.

In July, 1775, almost a year before the Declaration of Independence, Franklin prepared a sketch of a plan for union, and during the winter of 1775–1776 John Adams demanded with great insistence that attention should be given to forming a confederation among the colonies in revolt. A few weeks before the final announcement of independence, a committee was appointed by the Continental Congress to prepare the articles of union, and after several debates and tedious delays the final form was agreed upon in November, 1777. One after the other, the state legislatures approved the plan, and in March, 1781, they were put into effect. This document deserves careful study and comparison with the Constitution which supplanted it in 1789, for it was in the light of the actual experiences encountered under the Articles of Confederation that the existing framework of our federal government and its various functions were determined.

ARTICLES OF CONFEDERATION AND PERPETUAL UNION BETWEEN THE STATES OF NEW HAMPSHIRE, MASSACHUSETTS BAY, RHODE ISLAND AND PROVIDENCE PLANTATIONS, CONNECTICUT, NEW YORK, NEW JERSEY, PENNSYLVANIA, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, AND GEORGIA

ARTICLE I. — The style of this confederacy shall be, "The United States of America."

ART. II. — Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this confederation expressly delegated to the United States in Congress assembled.

[1] The names of the other signers are omitted.

ART. III. — The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.

)tection inter- ırse ong the tes.

ART. IV. — The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively; provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; provided, also, that no imposition, duties, or restriction, shall be laid by any State on the property of the United States or either of them.

If any person guilty of, or charged with, treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall, upon demand of the governor or executive power of the State from which he fled, be delivered up, and removed to the State having jurisdiction of his offense.

Full faith and credit shall be given, in each of these States, to the records, acts, and judicial proceedings of the courts and magistrates of every other State.

ıe ngress the ited ıtes.

ART. V. — For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State to recall its dele-

gates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year.

No State shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years, in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit, receives any salary, fees, or emolument of any kind.

Each State shall maintain its own delegates in any meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States, in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress; and the members of Congress shall be protected in their persons from arrests and imprisonments during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

Prohibition on the powers of states.

Art. VI. — No State, without the consent of the United States, in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty, with any king, prince, or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state; nor shall the United States, in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States, in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties which may interfere with any stipulations in treaties entered into by the United States,

in Congress assembled, with any king, prince, or state, in pursuance of any treaties already proposed by Congress to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any State, except such number only as shall be deemed necessary by the United States, in Congress assembled, for the defence of such State or its trade; nor shall any body of forces be kept up by any State, in time of peace, except such number only as, in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay, till the United States in Congress assembled can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States, in Congress assembled, and then only against the kingdom or state, and the subjects thereof against which war has been so declared, and under such regulations as shall be established by the United States, in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States, in Congress assembled, shall determine otherwise.

ART. VII. — When land forces are raised by any State for the common defense, all officers of or under the rank of colonel, shall be appointed by the legislature of each State respectively by whom such forces shall be raised, or in such manner as such State shall

direct, and all vacancies shall be filled up by the State which first made the appointment.

How taxes shall be levied.

ART. VIII. — All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to, or surveyed for, any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States, in Congress assembled, shall, from time to time, direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States, within the time agreed upon by the United States, in Congress assembled.

General powers of Congress with reference t foreign matters.

ART. IX. — The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth Article; of sending and receiving ambassadors; entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever; of establishing rules for deciding, in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States, shall be divided or appropriated; of granting letters of marque and reprisal in times of peace; appointing courts for the trial of piracies and felonies committed on the high seas; and establishing courts for receiving and determining finally appeals in all cases of captures; provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States, in Congress assembled, shall also be the last resort on appeal, in all disputes and differences now subsisting, or that hereafter may arise between two or more States con-

ow ongress ay settle isputes nong the ates.

cerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following: Whenever the legislative or executive authority, or lawful agent of any State in controversy with another, shall present a petition to Congress, stating the matter in question, and praying for a hearing, notice thereof shall be given by order of Congress, to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination; and if either party shall neglect to attend at the day appointed, without showing reasons which Congress shall judge sufficient, or being present, shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court, to be appointed in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence or judgment, which shall in like manner be final and decisive; the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned; provided, that every commissioner, before he sits in

judgment, shall take an oath, to be administered by one of the judges of the superior court of the State where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favour, affection, or hope of reward." Provided, also, that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdictions, as they may respect such lands, and the States which passed such grants, are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall, on the petition of either party to the Congress of the United States, be finally determined, as near as may be, in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

Powers of Congres in regulating domest concerns.

The United States, in Congress assembled, shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States; fixing the standard of weights and measures throughout the United States; regulating the trade and managing all affairs with the Indians not members of any of the States; provided that the legislative right of any State, within its own limits, be not infringed or violated; establishing and regulating post-offices from one State to another throughout all the United States, and exacting such postage on the papers passing through the same as may be required to defray the expenses of the said office; appointing all officers of the land forces in the service of the United States, excepting regimental officers; appointing all the officers of the naval forces, and commissioning all officers whatsoever in the service of the United States; making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States, in Congress assembled, shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated "A Committee of the States," and to consist of

one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction; to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses; to borrow money or emit bills on the credit of the United States, transmitting every half year to the respective States an account of the sums of money so borrowed or emitted; to build and equip a navy; to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State, which requisition shall be binding; and thereupon the Legislature of each State shall appoint the regimental officers, raise the men, and clothe, arm, and equip them in a soldier-like manner at the expense of the United States; and the officers and men so clothed, armed, and equipped shall march to the place appointed, and within the time agreed on by the United States, in Congress assembled; but if the United States, in Congress assembled, shall, on consideration of circumstances, judge proper that any State should not raise men, or should raise a smaller number than its quota, and that any other State should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, clothed, armed, and equipped in the same manner as the quota of such State, unless the Legislature of such State shall judge that such extra number can not be safely spared out of the same, in which case they shall raise, officer, clothe, arm, and equip as many of such extra number as they judge can be safely spared, and the officers and men . . . . shall march to the place appointed, and within the time agreed on by the United States, in Congress assembled.

nitations Congress.

The United States, in Congress assembled, shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regu-

late the value thereof, nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander-in-chief of the army or navy, unless nine States assent to the same, nor shall a question on any other point, except for adjourning from day to day, be determined, unless by the votes of a majority of the United States, in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances, or military operations as in their judgment require secrecy; and the yeas and nays of the delegates of each State, on any question, shall be entered on the journal when it is desired by any delegate; and the delegates of a State, or any of them, at his or their request, shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the legislatures of the several States.

The executive committee to act during recesses.

ART. X. — The committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States, in Congress assembled, by the consent of nine States, shall, from time to time, think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the Articles of Confederation, the voice of nine States, in the Congress of the United States assembled, is requisite.

ART. XI. — Canada acceding to this Confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same unless such admission be agreed to by nine States.

ART. XII. — All bills of credit emitted, moneys borrowed, and debts contracted by or under the authority of Congress, before the assembling of the United States, in pursuance of the present Confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States and the public faith are hereby solemnly pledged.

ART. XIII. — Every State shall abide by the determinations of the United States, in Congress assembled, on all questions which by this Confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.

And whereas it hath pleased the great Governor of the world to incline the hearts of the legislatures we respectively represent in Congress to approve of, and to authorize us to ratify the said Articles of Confederation and perpetual Union, Know ye, that we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do, by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said Articles of Confederation and perpetual Union, and all and singular the matters and things therein contained. And we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States, in Congress assembled, on all questions which by the said Confederation are submitted to them; and that the Articles thereof shall be inviolably observed by the States we respectively represent, and that the Union shall be perpetual. In witness whereof we have hereunto set our hands in Congress. Done at Philadelphia, in the State of Pennsylvania, the ninth day of July, in the year of our Lord 1778, and in the third year of the Independence of America.[1]

[1] Names of the signers omitted.

12. *The Continental Congress Recommends the Establishment of State Governments*

Amid the disorders of the armed conflict, the political power of the Revolutionists steadily increased until at length the government of each colony fell entirely into their hands. They continued, however, the old institutions with such slight modifications as the new circumstances demanded. In May, 1776, the Continental Congress, then aware that independence was the goal of the struggle, passed the following resolution recommending the establishment of state governments: —

In Congress, May 15, 1776.

All authority exercised under the British Crown to be suppressed

Whereas, His Britannic Majesty, in conjunction with the lords and commons of Great Britain, has by a late act of parliament excluded the inhabitants of these United Colonies from the protection of his crown: And, whereas, no answer whatever to the humble petitions of the colonies for redress of grievances and reconciliation with Great Britain has been or is likely to be given; but the whole force of the kingdom, aided by foreign mercenaries, is to be exerted for the destruction of the good people of these colonies. And whereas, it appears absolutely irreconcilable to reason and good conscience, for the people of these colonies now to take the oaths and affirmations necessary for the support of any government under the crown of Great Britain; and it is necessary that the exercise of every kind of authority, under the said crown should be totally suppressed, and all the powers of government exerted under the authority of the people of the colonies for the preservation of internal peace, virtue, and good order, as well as for the defense of their lives, liberties, and properties against the hostile invasions and cruel depredation of their enemies. Therefore,

Resolved, That it be recommended to the respective assemblies and conventions of the United Colonies, where no government sufficient to the exigencies of their affairs has been hitherto established, to adopt such government as shall, in the opinion of the

representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general.

By order of Congress,

JOHN HANCOCK, President.

13. *The Call for the Maryland State Convention*

The first state constitutions were drawn up by quite irregular assemblies of Revolutionists, and were not submitted to the people for ratification. The following call for the Maryland convention, issued by a revolutionary assembly for that province on July 3, 1776, can be taken to illustrate in a general way only the process of providing an official body for constructing the first state governments: —

Resolved, That a new convention be elected for the express purpose of forming a new government, by the authority of the people only, and enacting and ordering all things for the preservation, safety, and general weal of this colony.

e tribution repre- tation.

Resolved, That there be four representatives chosen for each of the districts of Frederick county, as described in the proceedings of the session of July last, two representatives for the city of Annapolis, and two representatives for the town of Baltimore of Baltimore county, and four representatives for each county in this province except Frederick county aforesaid; but that the inhabitants of Annapolis and Baltimore towns be not allowed to vote for representatives for the respective counties nor shall the resolution be understood to engage or secure such representation to Annapolis or Baltimore town, but temporarily, the same being, in the opinion of this convention, properly to be modified, or taken away, on a material alteration of the circumstances of those places, from either a depopulation or a considerable decrease of the inhabitants thereof.

perty lifica- is on ers.

That all freemen above twenty-one years of age, being freeholders of not less than fifty acres of land, or having visible property in this colony to the value of £40 sterling at the least and no others, be admitted to vote for representatives to serve in the said

convention for the said counties and districts, and the town of Baltimore aforesaid; and that all freemen above twenty-one years of age, owning a whole lot of land in the said city of Annapolis, or having a visible estate of £20 sterling at the least, within this province, or having served five years to any trade within the said city and being a house-keeper, and no others, be admitted to vote for representatives to serve in the said convention for the said city, provided such person shall have resided in the county, district, city or town where he shall offer to vote, one whole year next preceding the election.

That all elections of the said representatives be free, and that the same be made *viva voce* in the manner heretofore used in this colony, without any regard to any act of parliament or other qualifications than before mentioned. And to prevent any violence or force being used at the said elections, no person shall come armed to any of them. . . .

That any person qualified as aforesaid to vote, may be elected a member of the intended convention, provided he be above twenty-one years of age, and shall have resided in the colony one whole year preceding the election.

Royalists excluded from voting.

That no person who has been published by any committee of observation, or the council of safety of this colony, as an enemy to the liberties of America, and has not been restored to the favour of his country, shall be permitted to vote at the election of members for the said convention.

CHAPTER III

ESTABLISHMENT OF THE FEDERAL CONSTITUTION

The government under the Articles of Confederation practically tested.

THE Articles of Confederation had not been in force very long before it was abundantly demonstrated that the new government was inadequate to maintain the public credit of the nation, advance its economic and commercial interests, and guarantee domestic concord within and among the states. It was after a practical trial of the system that the political leaders of America came to see the necessity for reconstructing the federal union and were led to meditate seriously upon certain definite remedies for the abuses which had sprung up. The existence of a large number of clauses in the present Constitution, such as the one forbidding any state to pass a law impairing the obligation of contract, can be explained solely by reference to the conduct of states during the years 1781–1787. The reasons for the failure of the Articles of Confederation are ably summed up in the following document by Madison: —

14. *Madison's Criticism of the Articles of Confederation* *

States do not pay their taxes.

1. Failure of the States to Comply with the Constitutional Requisitions. This evil has been so fully experienced both during the war and since the peace, results so naturally from the number and independent authority of the States, and has been so uniformly exemplified in every similar Confederacy, that it may be considered as not less radically and permanently inherent in, than it is fatal to the object of, the present system.

2. Encroachments by the States on the Federal Authority. Examples of this are numerous, and repetitions may be foreseen in almost every case where any favorite object of a State shall present a temptation. Among these examples are the wars and

treaties of Georgia with the Indians, the unlicensed compacts between Virginia and Maryland, and between Pennsylvania and New Jersey, the troops raised and to be kept up by Massachusetts.

Obligatio with foreign powers not kept.

3. Violations of the Law of Nations and of Treaties. From the number of Legislatures, the sphere of life from which most of their members are taken, and the circumstances under which their legislative business is carried on, irregularities of this kind must frequently happen. Accordingly, not a year has passed without instances of them in some one or other of the States. The Treaty of Peace, the treaty with France, the treaty with Holland, have each been violated. The causes of these irregularities must necessarily produce frequent violations of the law of nations in other respects.

As yet, foreign powers have not been rigorous in animadverting on us. This moderation, however, cannot be mistaken for a permanent partiality to our faults, or a permanent security against those disputes with other nations, which, being among the greatest of public calamities, it ought to be least in the power of any part of the community to bring on the whole.

The state discrimin against one another.

4. Trespasses of the States on the Rights of Each Other. These are alarming symptoms, and may be daily apprehended, as we are admonished by daily experience. See the law of Virginia restricting foreign vessels to certain ports; of Maryland in favor of vessels belonging to her *own citizens;* of New York in favor of the same.

Creditors insecure.

Paper money, instalments of debts, occlusion of courts, making property a legal tender, may likewise be deemed aggressions on the rights of other States. As the citizens of every State, aggregately taken, stand more or less in the relation of creditors or debtors to the citizens of every other State, acts of the debtor State in favor of debtors affect the creditor State in the same manner as they do its own citizens, who are, relatively, creditors towards other citizens. This remark may be extended to foreign nations. If the exclusive regulation of the value and alloy of coin was properly delegated to the federal authority, the policy of

it equally requires a control on the States in the cases above mentioned. It must have been meant: (*a*) To preserve uniformity in the circulating medium throughout the nation. (*b*) To prevent those frauds on the citizens of other States, and the subjects of foreign powers, which might disturb the tranquillity at home, or involve the union in foreign contests.

mercial imina- s.

The practice of many States in restricting the commercial intercourse with other States, and putting their productions and manufactures on the same footing with those of foreign nations, though not contrary to the federal articles, is certainly adverse to the spirit of the Union, and tends to beget retaliating regulations, not less expensive and vexatious in themselves than they are destructive of the general harmony.

blesome onal sures ated by ersity tates.

5. Want of Concert in Matters Where Common Interest Requires It. This defect is strongly illustrated in the state of our commercial affairs. How much has the national dignity, interest, and revenue suffered from this cause? Instances of inferior moment are the want of uniformity in the laws concerning naturalization and literary property; of provision for national seminaries; for grants of incorporation for national purposes, for canals, and other works of general utility; which may at present be defeated by the perverseness of particular States whose concurrence is necessary.

es are anger of estic nce.

6. Want of Guaranty to the States of their Constitutions and Laws against Internal Violence. The Confederation is silent on this point, and therefore by the second article the hands of the federal authority are tied. According to Republican Theory, Right and power, being both vested in the majority, are held to be synonymous. According to fact and experience, a minority may, in an appeal to force, be an overmatch for the majority: (*a*) If the minority happen to include all such as possess the skill and habits of military life, and such as possess the great pecuniary resources, one-third only may conquer the remaining two-thirds. (*b*) One-third of those who participate in the choice of rulers may be rendered a majority by the accession of those whose poverty

excludes them from a right of suffrage, and who, for obvious reasons, will be more likely to join the standard of sedition than that of the established Government. (*c*) Where slavery exists, the Republican Theory becomes still more fallacious.

The Confederate government has no means of enforcing its laws.

7. Want of Sanction to the Laws and of Coercion in the Government of the Confederacy. A sanction is essential to the idea of law, as coercion is to that of Government. The federal system being destitute of both, wants the great vital principles of a Political Constitution. Under the form of such a Constitution, it is in fact nothing more than a treaty of amity, of commerce, and of alliance, between independent and Sovereign States. From what cause could so fatal an omission have happened in the Articles of Confederation? From a mistaken confidence that the justice, the good faith, the honor, the sound policy of the several legislative assemblies would render superfluous any appeal to the ordinary motives by which the laws secure the obedience of individuals; a confidence which does honor to the enthusiastic virtue of the compilers, as much as the inexperience of the crisis apologizes for their errors. The time which has since elapsed has had the double effect of increasing the light and tempering the warmth with which the arduous work may be revised.

The obedience of the stat cannot be relied upon

It is no longer doubted that a unanimous and punctual obedience of 13 independent bodies to the acts of the federal Government ought not to be calculated on. Even during the war, when external danger supplied in some degree the defect of legal and coercive sanctions, how imperfectly did the States fulfil their obligations to the Union? In time of peace we see already what is to be expected. How, indeed, could it be otherwise? In the first place, every general act of the Union must necessarily bear unequally hard on some particular member or members of it; secondly, the partiality of the members to their own interests and rights, a partiality which will be fostered by the courtiers of popularity, will naturally exaggerate the inequality where it exists, and even suspect it where it has no existence; thirdly, a distrust of the voluntary compliance of each other may prevent the com-

pliance of any, although it should be the latent disposition of all. Here are causes and pretexts which will never fail to render federal measures abortive. If the laws of the States were merely recommendatory to their citizens, or if they were to be rejudged by county authorities, what security, what probability would exist that they would be carried into execution? Is the security or probability greater in favor of the acts of Congress, which, depending for their execution on the will of the State legislatures, are, tho' nominally authoritative, in fact recommendatory only?

'he haracter f the nion makes issolution ossible.

8. Want of Ratification by the People of the Articles of Confederation. In some of the States the Confederation is recognized by and forms a part of the Constitution. In others, however, it has received no other sanction than that of the legislative authority. From this defect two evils result: (*a*) Whenever a law of a State happens to be repugnant to an act of Congress, particularly when the latter is of posterior date to the former, it will be at least questionable whether the latter must not prevail; and as the question must be decided by the Tribunals of the State, they will be most likely to lean on the side of the State. (*b*) As far as the union of the States is to be regarded as a league of sovereign powers, and not as a political Constitution, by virtue of which they are become one sovereign power, so far it seems to follow, from the doctrine of compacts, that a breach of any of the Articles of Confederation by any of the parties to it, absolves the other parties from their respective obligations, and gives them a right, if they choose to exert it, of dissolving the Union altogether.

uperfluous gislation y the ates.

9. Multiplicity of Laws in the Several States. Among the evils of our situation, may well be ranked the multiplicity of laws, from which no State is exempt. As far as laws are necessary to mark with precision the duties of those who are to obey them, and to take from those who are to administer them a discretion which might be abused, their number is the price of liberty. As far as laws exceed this limit they are a nuisance; a nuisance of the most pestilent kind. Try the Codes of the several States by this test, and what a luxuriancy of legislation do they present. The short

period of independency has filled as many pages as the century which preceded it. Every year, almost every session adds a new volume. A review of the several Codes will shew that every necessary and useful part of the least voluminous of them might be compressed into one-tenth of the compass, and at the same time be rendered ten-fold as perspicuous.

Instability of state legislation

10. Mutability of the Laws of the States. This evil is intimately connected with the former, yet deserves a distinct notice, as it emphatically denotes a vicious legislation. We daily see laws repealed or superseded before any trial can have been made of their merits, and even before a knowledge of them can have reached the remoter districts within which they were to operate. In the regulations of trade, this instability becomes a snare not only to our citizens, but to foreigners also.

15. *The Call for the Constitutional Convention, 1787*

The demand f a revision the Articl of Confederation

The recognition of the abuses arising from a weak form of confederate government naturally led earnest men to plan for its reconstruction. In 1780, even before the Articles of Confederation went into force, Hamilton had drafted a plan of a constitution; and in 1785 the legislature of Massachusetts, on the recommendation of Governor Bowdoin, passed a resolution in favor of calling a constitutional convention. The following year, on the initiative of Virginia, a convention met at Annapolis to consider the question of uniform commercial regulations, among other problems of interest to the states. Only five states were represented, so that no important business was transacted relating to the subject before the assembly, but a report, drawn up by Hamilton, recommending a general convention to revise the federal system was adopted. Hamilton's report was sent to the Confederate Congress as well as to the states, and on February 21, 1787, that body passed this resolution: —

Resolved, That, in the opinion of Congress, it is expedient that, on the second Monday in May next, a convention of delegates, who shall have been appointed by the several States, be held at Philadelphia, for the sole and express purpose of revising the

Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein as shall, when agreed to in Congress and confirmed by the States, render the federal constitution adequate to the exigencies of government and the preservation of the Union.

16. *New York Resolves to Appoint Delegates to the Convention*

The response to the resolution of Congress.

All of the states except Rhode Island responded to the resolution of Congress by appointing delegates to the convention. The resolution of the New York legislature given below is in general harmony with the form and tenor of the resolutions of the other states.

February, 1787.

Resolved, (if the Honourable the Assembly concur herein), That three Delegates be appointed on the part of this State to meet such Delegates as may be appointed on the part of the other States respectively, on the Second Monday of May next, at Philadelphia, for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and to the several Legislatures such alterations and provisions therein, as shall, when agreed to in Congress and confirmed by the several States, render the Federal Constitution adequate to the exigencies of Government and the preservation of the Union; and that, in case of such concurrence, the two Houses of the Legislature will on Tuesday next proceed to nominate and appoint the said delegates in like manner as is directed by the Constitution of this state for nominating and appointing delegates to Congress.

17. *The Difficulties Confronting the Convention* *

Owing to the diversity of interests among the states, the difficulties of bringing about an adjustment acceptable to all were numerous and weighty, and they appeared at one time so insuperable that Franklin recommended to the convention that special prayer be offered for Divine assistance. A clear statement of the fundamental obstacles in the way of a satisfactory constitutional

settlement is given in *The Federalist*, from which this extract is taken: —

The problem o combining liberty and strong governmer

Among the difficulties encountered by the convention, a very important one must have lain, in combining the requisite stability and energy in government, with the inviolable attention due to liberty, and to the republican form. Without substantially accomplishing this part of their undertaking, they would have very imperfectly fulfilled the object of their appointment, or the expectation of the public: yet that it could not easily be accomplished, will be denied by no one who is unwilling to betray his ignorance of the subject. Energy in government is essential to that security against external and internal dangers, and to that prompt and salutary execution of the laws, which enter into the very definition of good government. Stability in government is essential to national character, and to the advantages annexed to it, as well as to that repose and confidence in the minds of the people, which are among the chief blessings of civil society. An irregular and mutable legislation is not more an evil in itself, than it is odious to the people; and it may be pronounced with assurance that the people of this country, enlightened as they are, with regard to the nature, and interested, as the great body of them are, in the effects of good government, will never be satisfied, till some remedy be applied to the vicissitudes and uncertainties which characterize the state administrations.

Stability and frequent elections.

On comparing, however, these valuable ingredients with the vital principles of liberty, we must perceive at once the difficulty of mingling them together in their due proportions. The genius of republican liberty seems to demand on one side, not only that all power should be derived from the people; but that those entrusted with it should be kept in dependence on the people, by a short duration of their appointments; and that even during this short period, the trust should be placed not in a few, but in a number of hands. Stability, on the contrary, requires, that the hands, in which power is lodged should continue for a length of time the

same. A frequent change of men will result from a frequent return of elections; and a frequent change of measures, from a frequent change of men: whilst energy of government requires not only a certain duration of power, but the execution of it by a single hand.

Not less arduous must have been the task of marking the proper line of partition, between the authority of the general and that of the state governments. Every man will be sensible of this difficulty, in proportion as he has been accustomed to contemplate and discriminate objects, extensive and complicated in their nature. Experience has instructed us, also, that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the legislative, executive, and judiciary; or even the privileges or powers of the different legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.

The pretensions of the large and small states.

To the difficulties already mentioned, may be added the interfering pretensions of the larger and smaller states. We cannot err, in supposing that the former would contend for a participation in the government, fully proportioned to their superior wealth and importance; and that the latter would not be less tenacious of the equality at present enjoyed by them. We may well suppose, that neither side would entirely yield to the other, and consequently that the struggle could be terminated only by compromise. It is extremely probable also, that after the ratio of representation had been adjusted, this very compromise must have produced a fresh struggle between the same parties, to give such a turn to the organization of government, and to the distribution of its powers, as would increase the importance of the branches, in forming which they had respectively obtained the greatest share of influence. There are features in the constitution which warrant each of these suppositions; and as far as either of them is well founded, it shows that the convention must have been compelled to sacrifice theoretical propriety, to the force of extraneous considerations.

Nor could it have been the large and small states only, which

would marshal themselves in opposition to each other on various points. Other combinations, resulting from a difference of local position and policy, must have created additional difficulties. As every state may be divided into different districts and its citizens into different classes, which give birth to contending interests and local jealousies; so the different parts of the United States are distinguished from each other, by a variety of circumstances, which produce a like effect on a larger scale. And although this variety of interests, for reasons sufficiently explained in a former paper, may have a salutary influence on the administration of the government, when formed; yet every one must be sensible of the contrary influence which must have been experienced in the task of forming it.

The varying interests of the several states.

Would it be wonderful, if under the pressure of all these difficulties, the convention should have been forced into some deviations from that artificial structure and regular symmetry, which an abstract view of the subject might lead an ingenious theorist to bestow on a constitution planned in his closet, or in his imagination? The real wonder is that so many difficulties should have been surmounted; and surmounted with an unanimity almost as unprecedented, as it must have been unexpected. It is impossible for any man of candour to reflect on this circumstance, without partaking of the astonishment. It is impossible, for the man of pious reflection, not to perceive in it a finger of that Almighty Hand, which has been so frequently and signally extended to our relief in the critical stages of the revolution.

Deviation from perfect theor rendered avoidable.

18. *Hamilton's Plea for a Strong and Stable Government*

In Hamilton's view, the conduct of the legislatures of the several states during the period of confederation had demonstrated the inability of the people to rule themselves without powerful checks, and, in an argument for a life term for United States senators, he summed up his political philosophy.

All communities divide themselves into the few and the many. The first are the rich and well-born, the other the mass of the

people. The voice of the people has been said to be the voice of God; and, however generally this maxim has been quoted and believed, it is not true in fact. The people are turbulent and changing; they seldom judge or determine right. Give, therefore, to the first class a distinct, permanent share in the government. They will check the unsteadiness of the second, and, as they cannot receive any advantage by a change, they therefore will ever maintain good government. Can a democratic Assembly, who annually revolve in the mass of the people, be supposed steadily to pursue the public good? Nothing but a permanent body can check the imprudence of democracy. Their turbulent and uncontrollable disposition requires checks.

The Senate of New York, although chosen for four years, we have found to be inefficient. Will, on the Virginian plan, a continuance of seven years do it? It is admitted that you cannot have a good Executive upon a democratic plan. See the excellency of the British Executive. He is placed above temptation. He can have no distinct interests from the public welfare. Nothing short of such an executive can be efficient. The weak side of a republican government is the danger of foreign influence. This is unavoidable, unless it is so constructed as to bring forward its first characters in its support. I am, therefore, for a general government, yet would wish to go the full length of republican principles. Let one body of the Legislature be constituted during good behavior or life. Let one Executive be appointed who dares execute his powers. It may be asked: Is this a republican system? It is strictly so, as long as they remain elective. And let me observe, that an Executive is less dangerous to the liberties of the people when in office during life, than for seven years. It may be said, this constitutes an elective monarchy. Pray, what is a monarchy? May not the governors of the respective States be considered in that light? But, by making the Executive subject to impeachment, the term monarchy cannot apply. These elective monarchs have produced tumults in Rome, and are equally dangerous to peace in Poland; but this cannot apply to the mode

in which I would propose the election. Let electors be appointed in each of the States to elect the Legislature, to consist of two branches; and I would give them the unlimited power of passing all laws, without exception. The Assembly to be elected for three years, by the people in districts. The Senate to be elected by electors to be chosen for that purpose by the people, and to remain in office during life. The Executive to have the power of negativing all laws; to make war or peace, with their advice, but to have the sole direction of all military operations, and to send ambassadors, and appoint all military officers; and to pardon all offenders, treason excepted, unless by advice of the Senate. On his death or removal, the President of the Senate to officiate, with the same powers, until another is elected. Supreme judicial officers to be appointed by the Executive and the Senate.

State laws to be controlled by the federal government

The Legislature to appoint courts in each State, so as to make the State governments unnecessary to it. All State laws which contravene the general laws to be absolutely void. An officer to be appointed in each State, to have a negative on all State laws. All the militia, and the appointment of officers, to be under the national government. I confess that this plan and that from Virginia are very remote from the idea of the people. Perhaps the Jersey plan is nearest their expectation. But the people are gradually ripening in their opinions of government; they begin to be tired of an excess of democracy; and what even is the Virginia plan, but "pork still, with a little change of sauce."

19. *The Philosophy of the American Constitutional System according to Madison*

The Constitution a compromise between democracy and aristocracy.

However much some of the members of the convention sympathized with the extreme views of Hamilton, it was the consensus of opinion that a golden mean should be sought between direct popular rule and the more aristocratic system which he proposed. The framers of the Constitution, therefore, sought to avoid "an excess of democracy on one hand and an excess of aristocracy on the other," and the logic of their system is thus admirably stated by Madison.

The evils rising from overbearing majority rule.

Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and personal liberty, that our governments are too unstable; that the public good is disregarded in the conflicts of rival parties; and that measures are too often decided, not according to the rules of justice, and the rights of the minor party, but by the superior force of an interested and overbearing majority. However anxiously we may wish that these complaints had no foundation, the evidence of known facts will not permit us to deny that they are in some degree true. It will be found, indeed, on a candid review of our situation, that some of the distresses under which we labor, have been erroneously charged on the operation of our governments; but it will be found, at the same time, that other causes will not alone account for many of our heaviest misfortunes; and, particularly, for that prevailing and increasing distrust of public engagements, and alarm for private rights, which are echoed from one end of the continent to the other. These must be chiefly, if not wholly, effects of the unsteadiness and injustice, with which a factious spirit has tainted our public administrations.

Definition of a faction.

By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

The origin of diverse opinions.

As long as the reason of man continues fallible and he is at liberty to exercise it, different opinions will be formed. As long as the connection exists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves. The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to an uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the pos-

session of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties. . . .

The unequal distributio of propert a source of party divisions.

The most common and durable source of factions has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of government.

How injustice mi arise in legislation

No man is allowed to be a judge in his own cause; because his interest will certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay, with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? and what are the different classes of legislators, but advocates and parties to the causes which they determine? Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side, and the debtors on the other. Justice ought to hold the balance between them. Yet the parties are, and must be, themselves the judges: and the most numerous party, or, in other words, the most powerful faction, must be expected to prevail. Shall domestic manufactures be encouraged, and in what degree, by restrictions on foreign manufactures? are questions which would be differently decided by the landed and the manufacturing classes; and probably by neither with a sole regard to justice and the public good. The appor-

tionment of taxes, on the various descriptions of property, is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party, to trample on the rules of justice. Every shilling, with which they overburden the inferior number, is a shilling saved to their own pockets.

Enlightened statesmen cannot prevent clashes.

It is in vain to say, that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm: nor, in many cases, can such an adjustment be made at all, without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another, or the good of the whole.

Factions must be balanced against one another.

The inference to which we are brought is, that the *causes* of faction cannot be removed; and that relief is only to be sought in the means of controlling its *effects*. If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views, by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the constitution. When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens. To secure the public good, and private rights, against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. Let me add, that it is the great desideratum, by which alone this form of government can be rescued from the opprobrium under which it has so long laboured, and be recommended to the esteem and adoption of mankind.

By what means is this object attainable? Evidently by one of two only. Either the existence of the same passion or interest in a majority, at the same time must be prevented; or the majority,

having such coexistent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression. If the impulse and the opportunity be suffered to coincide, we well know, that neither moral nor religious motives can be relied on as an adequate control. They are not found to be such on the injustice and violence of individuals, and lose their efficacy in proportion to the number combined together; that is, in proportion as their efficacy becomes needful.

Majorities must be prevented from oppressing minorities.

20. *Transmission of the New Constitution to Congress*

The convention of delegates to revise the Articles of Confederation was organized on May 25, 1787, and, casting aside the instructions given to the members by their respective state legislatures, drafted a wholly new document. The work was completed by the signing of the instrument on September 17, and the new Constitution was then transmitted to the Congress with the following recommendations: —

Resolved, That the preceding constitution be laid before the United States in congress assembled, and that it is the opinion of this convention, that it should afterwards be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification; and that each convention assenting thereto, and ratifying the same, should give notice thereof to the United States in congress assembled.

The Constitution to be ratified by state conventions

Resolved, That it is the opinion of this convention, that as soon as the conventions of nine States shall have ratified this constitution, the United States in congress assembled should fix a day on which electors should be appointed by the states which shall have ratified the same, and a day on which the electors should assemble to vote for the president, and the time and place for commencing proceedings under this constitution. That after such publication the electors should be appointed, and the senators and representatives elected; that the electors should meet on

Congress should provide for the election to be held under the new Constitution.

the day fixed for the election of the president, and should transmit their votes certified, signed, sealed, and directed, as the constitution requires, to the secretary of the United States in congress assembled; that the senators and representatives should convene at the time and place assigned; that the senators should appoint a president of the senate, for the sole purpose of receiving, opening, and counting the votes for president; and that after he shall be chosen, the congress, together with the president, should without delay proceed to execute this constitution.

By the unanimous order of the convention.

GEORGE WASHINGTON, President.

21. *Ratification of the New Constitution by the States*

Congress acted on the recommendations of the convention and transmitted the document to the states for approval or disapproval by special conventions. The process of ratification is fully illustrated by the formal announcement issued by the Georgia convention on January 2, 1788.[1]

In Convention, Wednesday, January 2, 1788.

To all to whom these presents shall come, Greeting:

Where the form of a Constitution for the government of the United States of America, was, on the 17th day of September, 1787, agreed upon and reported to Congress by the deputies of the said United States convened in Philadelphia, which said Constitution is written in the words following, to wit: . . . . .

And whereas the United States in Congress assembled did, on the 28th day of September, 1787, *resolve*, unanimously, "That the said report, with the resolution and letter accompanying the same, be transmitted to the several legislatures, in order to be

[1] The dates of ratification are as follows: Delaware, December 7, 1787; Pennsylvania, December 12, 1787; New Jersey, December 18, 1787; Georgia, January 2, 1788; Connecticut, January 9; Massachusetts, February 7; Maryland, April 28; South Carolina, May 23; New Hampshire (the ninth state), June 21, 1788; Virginia, June 25; New York, July 26, 1788; North Carolina, November 21, 1789; Rhode Island, May 29, 1790.

submitted to a convention of delegates chosen in each State by the people thereof, in conformity to the resolves of the Convention made and provided in that case."

How the state convention was called

And whereas the legislature of the State of Georgia did, on the 26th day of October, 1787, in pursuance of the above recited resolution of Congress, *resolve*, that a convention be elected on the day of the next general election, and in the same manner that representatives are elected; and that the said Convention consist of not more than three members from each county; and that the said convention should meet at Augusta, on the 4th Tuesday in December then next, and, as soon thereafter as convenient, proceed to consider the said report and resolutions, and to adopt or reject any part or the whole thereof.

Now know ye, that we, the delegates of the people of the State of Georgia, in convention met, pursuant to the resolutions of the legislature aforesaid, having taken into our serious consideration the said Constitution, have assented to, ratified, and adopted, and by these presents do, in virtue of the powers and authority to us given by the people of the said State, for that purpose, for and in behalf of ourselves and our constituents, fully and entirely assent to, ratify, and adopt, the said Constitution.

The convention ratifies the Constitution

Done in Convention, at Augusta, in the said State, on the 2d day of January, in the year of our Lord 1788, and of the independence of the United States the 12th.

In witness whereof, we have hereunto subscribed our names.

JOHN WEREAT, President,
and delegate for the county of Richmond.

CHAPTER IV

THE DEVELOPMENT OF THE FEDERAL CONSTITUTION

SINCE the federal Constitution was established, the thirteen original states have increased to forty-six, the economic system prevailing at the close of the eighteenth century has been overthrown by the Industrial Revolution, and undreamt-of social questions have been raised. Before this marvelous development of the nation, the system of government devised in 1787 would have broken down, if attempts had been made to limit its operations to the strict letter of the law. It is true that Article V of the instrument made provisions for amendments, but the fifteen articles that have been added by the formal process are no index to the real constitutional evolution of the country. This must be sought in congressional statutes, judicial decisions, executive actions, and party practices.

22. *The Formal Amending Process*

ticle V the Con- tution.

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first Article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

23. *Initiation of an Amendment*

Although the above article provided four modes by which the Constitution may be amended, it does not describe at all the details of the procedure. The practice, however, may be illustrated by the following documents, tracing the steps in the initiation, ratification, and proclamation, of the thirteenth amendment:

Congress proposes the amendmen to the states.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of both houses concurring), That the following article be proposed to the legislatures of the several States as an amendment to the constitution of the United States, which, when ratified by three fourths of the said Legislatures, shall be valid, to all intents and purposes, as a part of the said Constitution, namely: Article XIII. Section I. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation.

SCHUYLER COLFAX,
Speaker of the House of Representatives.

H. HAMLIN,
Vice President of the United States,
and President of the Senate.

Approved, February 1, 1865. ABRAHAM LINCOLN.

[Indorsement.]

I certify that this Resolution did originate in the Senate.

J. W. FORNEY,
Secretary.

24. *Ratification of an Amendment by a State*

State of Rhode Island, &c.

Whereas, Both Houses of the Congress of the United States have proposed an Amendment to the Constitution of the United States in the words and figures following, to wit:

Article XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

IT IS THEREFORE RESOLVED, That the Legislature of the State of Rhode Island do hereby ratify and confirm the said Article XIII of Amendment to the said Constitution of the United States and do hereby assent thereto.

A TRUE COPY.

In testimony whereof I have hereto set my hand and affixed my seal of the State of Rhode Island, this second day of February A.D. 1865, the day of the adoption of the said resolution.

JOHN R. BARTLETT,
Secretary of State.

(Seal)

25. *Official Proclamation of an Amendment*

William H. Seward,

Secretary of State of the United States,

To all to whom these presents may come, Greeting:

Know Ye, that, whereas the Congress of the United States, on the 1st of February last, passed a Resolution which is in the words following, namely:

"A Resolution submitting to the Legislatures of the several States a Proposition to amend the Constitution of the United States.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two thirds of both Houses concurring), That the following Article be proposed to the legislatures of the several states as an amendment to the constitution of the United States, which, when ratified by three fourths of said legislatures, shall be valid, to all intents and purposes, as a part of the said constitution, namely: —

"Article XIII

"Section 1. Neither slavery nor involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted shall exist within the United States, or any place subject to their jurisdiction.

"Section 2. Congress shall have authority to enforce this article by appropriate legislation."

The requisite number of ratifications received.

And, whereas it appears, from official documents on file in this Department, that the amendment to the Constitution of the United States proposed, as aforesaid, has been ratified by the legislatures of the States of Illinois, Rhode Island, Michigan, Maryland, New York, West Virginia, Maine, Kansas, Massachusetts, Pennsylvania, Virginia, Ohio, Missouri, Nevada, Indiana, Louisiana, Minnesota, Wisconsin, Vermont, Tennessee, Arkansas, Connecticut, New Hampshire, South Carolina, Alabama, North Carolina, and Georgia; in all twenty-seven States:

And, whereas the whole number of States in the United States is thirty-six; and whereas the before specially named States, whose legislatures have ratified the said proposed amendment, constitute three-fourths of the whole number of States in the United States:

Now, therefore, be it known that I, William H. Seward, Secretary of State of the United States, by virtue and in pursuance of the second section of the Act of Congress, approved the twen-

The amendment is therefore a part of the Constitution.

tieth of April, eighteen hundred and eighteen, entitled — "An Act to provide for the publication of the laws of the United States and for other purposes," do, hereby, certify that the amendment aforesaid has become valid, to all intents and purposes, as a part of the Constitution of the United States.

In testimony whereof, I have hereunto set my hand and caused the seal of the Department of State to be affixed.

Done at the city of Washington, this eighteenth day of December, in the year of our Lord one thousand eight hundred and sixty-five, and of the Independence of the United States of America the ninetieth.

[Seal]

WILLIAM H. SEWARD,
Secretary of State.

Approved
Andrew Johnson
Decr. 18, 1865.

26. *Initiation of an Amendment by a State*

Only one of the four possible modes of amending the federal Constitution has been used in actual practice; namely, that of initiation by Congress and ratification by state legislatures. However state legislatures have, on many occasions, proposed calling a convention in the form prescribed by the Constitution, and the following joint resolution by the Oklahoma legislature is a rather unique device for urging an amendment providing for the popular election of senators: —

STATE OF OKLAHOMA

SENATE JOINT RESOLUTION NO. 9. — Relating to the calling of a convention of the States to propose amendments to the Constitution of the United States providing for the election of United States Senators by direct vote of the people, and for other purposes, and providing for the appointment of a senatorial election commission of the State of Oklahoma.

Whereas a large number of the State legislatures have at various times adopted memorials and resolutions in favor of the election of United States Senators by direct vote of the people of the respective States; and

Whereas the National House of Representatives has on several different occasions in recent years adopted resolutions in favor of the proposed change in the method of electing United States Senators, which were not adopted by the Senate: Therefore

Be it resolved by the senate and the house of representatives of the State of Oklahoma:

Section 1. That the legislature of the State of Oklahoma, in accordance with the provisions of Article V of the Constitution of the United States, desires to join with the other States of the Union to respectfully request that a convention of the several States be called for the purpose of proposing amendments to the Constitution of the United States, and hereby apply to and request the Congress of the United States to call such convention and to provide for submitting to the several States the amendments so proposed for ratification by the legislatures thereof, or by conventions therein, as one or the other mode of ratification may be proposed by Congress. The call for a convention.

Sec. 2. That at said convention the State of Oklahoma will propose, among other amendments, that section 3 of Article I of the Constitution of the United States should be amended to read as follows:

"The Senate of the United States shall be composed of two Senators from each State, chosen by the electors thereof, as the governor is chosen, for six years; and each Senator shall have one vote. They shall be divided as equally as may be into three classes, so that one-third may be chosen every year; and if vacancies happen by resignation or otherwise the governor may make temporary appointments until the next regular election in such State. No person shall be a Senator who shall not have attained the age of 30 years, and been nine years a citizen of the United States, and who shall not when elected be an elector of the The amendment

State for which he shall be chosen. The Vice-President of the United States shall be President of the Senate, but shall have no vote unless they be equally divided. The Senate shall choose their own officers and also a President pro tempore in the absence of the Vice-President or when he shall exercise the office of the President of the United States."

A commission to urge the cause.

Sec. 3. A legislative commission is hereby created, to be composed of the governor and eight members, to be appointed by him, not more than four of whom shall belong to the same political party, to be known as the senatorial direct-election commission of the State of Oklahoma. It shall be the duty of said legislative commission to urge action by the legislatures of the several States and by the Congress of the United States to the end that a convention may be called as provided in section 1 hereof. The members of said commission shall receive no compensation.

Sec. 4. That the governor of the State of Oklahoma is hereby directed forthwith to transmit certified copies of this joint resolution and application to both Houses of the United States Congress, to the governor of each State in the Union, and to each of our Representatives and Senators in Congress.

GEORGE W. BELLAMY,
President of the Senate.

WM. H. MURRAY.
Speaker of the House of Representatives.

Approved January 9, 1908.

C. N. HASKELL,
Governor of the State of Oklahoma.

27. *Judicial Expansion of the Constitution* *

There is perhaps no better example of the way in which the bare letter of the federal Constitution may be expanded by judicial reasoning than the famous opinion of Chief Justice Marshall in the case of McCulloch *v.* Maryland. In 1816 Congress

authorized the establishment of the Second United States Bank and two years later Maryland imposed a tax on the circulating notes of its branches in that state. Here was a knotty judicial problem; Congress was not expressly authorized to establish a Federal Bank, and Maryland was not expressly forbidden to impose the tax in question. The Supreme Court, however, decided that the Bank was constitutional and the Maryland tax was invalid.[1]

Powers enumerated, but the extent not defined.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

The Constitution does not minutely describe enumerated powers.

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the Articles of Confederation, excludes incidental or implied powers;[2] and which requires that everything granted shall be expressly and minutely described. Even the 10th Amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited

[1] In speaking of the constitutionality of the first Bank bill, Madison said: "It appeared on the whole that the power exercised by the bill was condemned by the silence of the Constitution; was condemned by the rule of interpretation arising out of the Constitution . . . condemned by the expositions of the friends of the Constitution whilst depending before the people; was condemned by the apparent intentions of the parties which ratified the Constitution; was condemned by the explanatory amendments proposed by the Congress themselves to the Constitution." For Jefferson's view, see below, p. 237.

[2] See above, p. 25.

to the other, to depend on a fair construction of the whole instrument.

Petty restrictions should not hinder the use of the great powers.

Although, among the enumerated powers of government, we do not find the word "bank," or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It may, with great reason, be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depend, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means.

The vast revenue operations should be facilitated.

Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the North should be transported to the South, that raised in the East conveyed to the West, or that this order should be reversed. Is that construction of the Constitution preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the Constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

Appropriate means may be used for legitimate ends.

We think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

Reasons why the Constitution did not mention corporations.

That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been sufficiently proved. If we look to the origin of corporations, to the manner in which they have been framed in that government from which we have derived most of our legal principles and ideas, or the uses to which they have been applied, we find no reason to suppose that a constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified this. Had it been intended to grant this power as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the government. But being considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it.

A banking corporation may be used as well as any other corporation.

If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of Congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing its importance and necessity; and so strongly

have they been felt, that statesmen of the first class, whose previous opinions against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. Under the confederation, Congress justifying the measure by its necessity, transcended, perhaps, its powers to obtain the advantage of a bank; and our own legislation attests the universal conviction of the utility of this measure.

Conclusion.

Were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

28. *The Congressional Expansion of the Constitution to Meet New Needs*

Congress has never allowed constitutional quibbles to stand in the way of important legislation in behalf of national interests. The way in which it has brushed aside narrow interpretations is eloquently described by Mr. Jones in the following speech made in the House of Representatives in 1902, in favor of appropriations for irrigation: —

Constitutional objections constantly arise.

We are met at the threshold of the discussion of this bill with the same objection that has met every other great question in the past; with the same obstacle that has been in the way of every upward and onward growth of our nation since its foundation; with the same reason that would dwarf, throttle and destroy our national life and progress — it is unconstitutional. How often have we heard that cry! What great measure has ever been presented for our country's welfare that has not been met with this objection? The pathway of our national progress to glory and greatness is strewn with the fragments of constitutional objections.

Measures that have been called unconstitutional.

A protective tariff, under which our home industries have been fostered and developed until we are able to supply our own markets and also reach out for the markets of the world; under which the farmer has secured a market for his produce at fair and remunerative prices; under which the manufacturer has been able to sell his products and develop and broaden his industries, and under which the laborer of the country has had his wages maintained at a scale nowhere equalled, was unconstitutional. The national banking system of this country was pronounced unconstitutional. The inauguration of the system of internal improvements that has done so much for the building up of commerce and the country was unconstitutional.

The limitation placed on the extension of slavery was unconstitutional. The salvation and preservation of the Union itself was declared to have been done through unconstitutional means. The issuance and redemption of the greenbacks was unconstitutional. The throttling of polygamy at the very threshold of the national capital was unconstitutional. The growth of the nation in the acquisition of Hawaii, Porto Rico, and the Philippines was unconstitutional. But, notwithstanding all this, the nation still lives, the Constitution still lives, and the zenith of our nation's glory has not yet been reached.

The Constitution designed to promote national growth.

The Constitution, instead of being an instrument to strangle and destroy national growth and development, is the very soul and life of the nation in expanding and broadening as the necessities of civilisation and development demand. The extent of our greatness has not yet been measured. With relentless power these constitutional quibbles have been and will be brushed aside, that our nation may grow and develop into the great Republic, the admiration and hope of mankind, the exemplar and the ideal of all liberty-loving people. That this objection to the bill under consideration will meet the same fate we do not doubt, and should the question ever come up for consideration before the Supreme Court, there can be no question but that its decision will add life and not death to the Constitution. . . .

The protection of property owners along the Mississippi.

The main purpose of this bill is to reclaim worthless property of the Government and make it valuable. The Government has constructed levees along the Mississippi River. Why? Ostensibly to aid commerce; primarily to protect farms and lands from destruction by overflow. Not public lands, either, but private lands. If the Government can do this, why can it not turn water onto its dry and worthless lands to make them valuable and productive? The Government has granted swamp lands to the States upon the condition that they will reclaim them. If it can do this, can it not provide for the irrigation and watering of its own lands in its own way and by the exercise of its own power?

The grants to railways.

The Government has granted millions of its public domains directly to railroad companies in order that roads might be built across the continent. Some there be who condemn this policy and yet no one can cross this continent and not realise the immeasurable benefit that has been brought to the nation by the construction of these roads, and no one can see the almost insurmountable difficulties encountered and overcome and not appreciate that aid of this kind was necessary to secure the early construction of these roads. What was the object of these grants? Not for the benefit of the corporation or the individual but for the benefit of the nation, for the growth and development of the people, and for the settlement and development of the public domain of the country. If the Government can do this, if it can turn this property over to private individuals in order that its public domain may be settled, can it not take the proceeds of the sale of its public domain and use them in reclaiming these public lands?

Ship subsidy.

There are those who advocate the granting of a subsidy for the building up of the merchant marine. Some of those who advocate such a measure are opposed to this bill. I am in favor of a subsidy if that will place the American flag upon the seas, but if we can use money of the Government for such a purpose — and I believe we can — surely the Government can use its money for reclaiming its own lands. If it can improve property of others, it certainly can improve its own. If it can pay others for im-

proving its own property, it certainly can improve this property itself.

The Constitution an instrument of the people.

What is the Government? Is it not the instrument of the people? The people are not for the Government, as some seem to think, but the Government is for the people, and I believe that under our Constitution any measure that results in great good to a great number of our people and tends to make the people happier, more prosperous, and more contented will find warrant under the Constitution. If we can expend millions in aid of commerce, we certainly can expend a few millions to create commerce.

29. *The Constitution and Executive Practice*

The war power of the President.

The "dark continent" of presidential war power was not explored until the Civil War, when Lincoln, without express warrant from the Constitution, blockaded several Southern ports, authorized the suspension of the writ of habeas corpus at different places, and finally destroyed slavery in many states, although that institution within commonwealths in times of peace was entirely beyond the reach of both Congress and the President. In the following letter written in 1864, Lincoln describes the process of reasoning by which he arrived at the conclusion that he had constitutional warrant for this assumption of power: —

The oath to preserve the Constitution justified the use of indispensable means.

I did understand, however, that my oath to preserve the Constitution to the best of my ability, imposed on me the duty of preserving by every indispensable means, that government — that nation of which that Constitution was the organic law. Was it possible to lose the nation and yet preserve the Constitution? By general law, life and limb must be protected; yet often a limb must be amputated to save a life, but a life is never wisely given to save a limb. I felt that measures, otherwise unconstitutional, might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation. Right or wrong, I assumed this ground and now avow it. I could not feel that, to the best of my ability, I had even tried to preserve the Constitution, if, to preserve slavery, or any minor

matter, I should permit the wreck of government, country, and Constitution altogether.

How Lincoln waited for the imperative necessity.

When, early in the war, General Fremont attempted military emancipation, I forbade it, because I did not then think it an indispensable necessity. When, a little later, General Cameron, then Secretary of War, suggested arming the blacks, I objected because I did not then think it an indispensable necessity. When, still later, General Hunter attempted military emancipation, I again forbade it, because I did not yet think the indispensable necessity had come. When, in March and May and July, 1862, I made earnest and successive appeals to the border States to favor compensated emancipation, I believed the indispensable necessity for military emancipation and arming the blacks would come, unless averted by that measure. They declined the proposition; and I was, in my best judgment, driven to the alternative of either surrendering the Union and with it the Constitution, or of laying strong hand upon the colored element. I chose the latter.

30. *The Third Term Doctrine*

The principle that no President should accept a third term is as well established in practice as if it were embodied in the Constitution itself. Jefferson thus comments on the origin of the principle: —

Jefferson on the origin of the doctrine.

My opinion originally was that the President should have been elected for seven years, and forever ineligible afterwards. I have since become sensible that seven years is too long to be irremovable, and that there should be a peaceable way of withdrawing a man in midway who is doing wrong. The service for eight years, with a power to remove at the end of the first four, comes nearly to my principle as corrected by experience, and it is in adherence to that, that I determine to withdraw at the end of my second term. The danger is that the indulgence and attachments of the people will keep a man in the chair after he becomes a dotard, that reëlection through life shall become habitual,

and election for life follow that. General Washington set the example of voluntary retirement after eight years. I shall follow it. And a few more precedents will oppose the obstacle of habit to any one after awhile who shall endeavor to extend his term. Perhaps it may beget a disposition to establish it by an amendment of the Constitution. . . .

In 1875 when the friends of President Grant were demanding a third term for him, the House of Representatives on December 15 passed this resolution commending the precedent set by Washington and Jefferson and followed by their successors: —

The House of Representatives commends the doctrine.

Resolved, That, in the opinion of this House, the precedent established by Washington and other Presidents of the United States, in retiring from the presidential office after their second term, has become, by universal concurrence, a part of our republican system of government, and that any departure from this time-honored custom would be unwise, unpatriotic, and fraught with peril to our free institutions.

CHAPTER V

THE DEVELOPMENT OF STATE CONSTITUTIONS

The development of state constitutions illustrates our political progress.

THE extent to which the social and political institutions of the American people have departed from the models set by the statesmen of the eighteenth century is nowhere more clearly revealed than in the development of state constitutions. In them the establishment of political democracy is recorded, and numerous legal rules for meeting practical problems are laid down. In short, they are, as Mr. Bryce points out, "a mine of instruction for the natural history of democratic communities."[1]

31. *Early State Constitutions*

The belief of our early constitution-makers that stable government could be founded only on the rule of the propertied classes, especially the freeholders, is fully demonstrated in the first state constitutions, the character of which may be fairly illustrated by these extracts from the fundamental laws of Georgia and Maryland:—

Extract from the Georgia Constitution of 1789

ARTICLE I

Qualifications for senators

Section 3. No person shall be a member of the senate who shall not have attained to the age of twenty-eight years, and who shall not have been nine years an inhabitant of the United States, and three years a citizen of this State; and shall be an inhabitant of that county for which he shall be elected, and have resided therein six months immediately preceding his election, and shall

[1] For an extract illustrating the process of amending state constitutions, see below, p. 411.

be possessed in his own right of two hundred and fifty acres of land, or some property to the amount of two hundred and fifty pounds.

Section 7. No person shall be a member of the house of representatives who shall not have attained to the age of twenty-one years, and have been seven years a citizen of the United States, and two years an inhabitant of this State; and shall be an inhabitant of that county for which he shall be elected, and have resided therein three months immediately preceding the election; and shall be possessed in his own right of two hundred acres of land, or other property to the amount of one hundred and fifty pounds. and representatives.

ARTICLE II

Sec. 2. The house of representatives shall, on the second day of their making a house, in the first, and in every second year thereafter, vote by ballot for three persons; and shall make a list containing the names of the persons voted for, and of the number of votes for each person; which list the speaker shall sign in the presence of the house, and deliver it in person to the senate; and the senate shall, on the same day, proceed, by ballot, to elect one of the three persons having the highest number of votes; and the person having a majority of the votes of the senators present shall be the governor. The election of the governor.

Sec. 3. No person shall be eligible to the office of governor who shall not have been a citizen of the United States twelve years, and an inhabitant of this State six years, and who hath not attained to the age of thirty years, and who does not possess five hundred acres of land, in his own right, within this State, and other species of property to the amount of one thousand pounds sterling. The governor's qualifications.

Extract from the Maryland Constitution of 1776

II. That the House of Delegates shall be chosen in the following manner: All freemen, above twenty-one years of age, having Elections the lower house.

a free-hold of fifty acres of land, in the county in which they offer to vote, and residing therein — and all freemen, having property in this State above the value of thirty pounds current money, and having resided in the county, in which they offer to vote, one whole year next preceding the election, shall have a right of suffrage, in the election of Delegates for such county: and all freemen, so qualified, shall, on the first Monday of October, seventeen hundred and seventy-seven, and on the same day in every year thereafter, assemble in the counties, in which they are respectively qualified to vote, at the courthouse, in the said counties; or at such other place as the Legislature shall direct; and, when assembled, they shall proceed to elect, *viva voce*, four Delegates, for their respective counties, of the most wise, sensible, and discreet of the people, residents in the county where they are to be chosen, one whole year next preceding the election, above twenty-one years of age, and having, in the State, real or personal property above the value of five hundred pounds current money; and upon the final casting of the polls, the four persons who shall appear to have the greatest number of legal votes shall be declared and returned duly elected for their respective counties.

he ›vernor ıosen by ıint ıllot.

XXV. That a person of wisdom, experience and virtue, shall be chosen Governor, on the second Monday of November, seventeen hundred and seventy-seven, and on the second Monday in every year forever thereafter, by the joint ballot of both Houses (to be taken in each House respectively) deposited in a conference room; the boxes to be examined by a joint committee of both Houses, and the numbers severally reported, that the appointment may be entered; which mode of taking the joint ballot of both Houses shall be adopted in all cases. . . .

he ›vernor's ıuncil.

XXVI. That the Senators and Delegates, on the second Tuesday of November, 1777, and annually on the second Tuesday of November forever thereafter, elect by joint ballot (in the same manner as Senators are directed to be chosen) five of the most sensible, discreet, and experienced men, above twenty-five years of age, residents in the State above three years next preceding the

election, and having therein a freehold of lands and tenements, above the value of one thousand pounds current money, to be the Council to the Governor, whose proceedings shall always be entered on record, to any part whereof any member may enter his dissent; and their advice, if so required by the Governor, or any member of the Council, shall be given in writing, and signed by the members giving the same respectively; which proceedings of the Council shall be laid before the Senate, or House of Delegates, when called for by them or either of them.

32. *American Rotten Boroughs* *

The doctri of apportionment according population

It is one of the cardinal principles of modern democracies that representatives should be distributed fairly among districts substantially equal in population. This principle has now been widely adopted, although there are still marked exceptions, notably in Connecticut, Rhode Island, and New Hampshire,[1] but in the beginning of our political history it was not recognized as a controlling theory in the apportionment of representatives among the various state districts. In fact, there were in a number of states conditions very similar to those prevailing in England before the Reform Bill of 1832, and they were the subject of constant criticism on the part of democratic writers like Niles, from whose *Weekly Register* (1821) this extract is taken: —

Old Sarur almost duplicated in the United States.

What hypocrites are we, to censure and rail at England, for her manner of electing members of the house of commons, while several of our states have their legislative power constituted on the same principle, and which, in time, may become the same in practice, by changes in the state of population, without changes in their political constitutions. Old Sarum, which now has not one resident elector, though it sends two members to parliament, once was a place of some consequence — it has gone to decay — a single house remains to point the spot whereon the borough stands. Thus also, certain counties that I could name, in certain parts of the United States, are passing to decay — large tracts of

[1] Dealey, *Our State Constitutions* (1907), Chap. XI.

country that were cultivated a century ago, are now covered with new growths of stunted timber, the haunt of the deer and other timid animals of the forest. The people have mostly departed for new and better lands — yet the power of representation remains; and it may easily happen, if this course of things is continued, that one freeholder may possess the soil of several counties, and, like an English lord, elect 4, 6, 8, or 10 of his creatures to a state legislature, to make laws for freemen.

urty uabbles in aryland event form.

Three or four of the old states are governed on this outrageous plan — Maryland and Virginia, and especially the latter, stand conspicuous for such violations of everything that is honest, everything that is just. In Maryland, the nice balance of political parties (according to the present manner in which power is derived), and the dirty struggles between the ins and outs, seem to swallow up the reason of the matter, and prevent a reformation which every man admits ought to take place: the sense of honor and a love of justice is sacrificed to a possession of party power — to put into or put out of office a few insignificant individuals; — for this (say what one can) is the real amount of the present political contests in Maryland: neither party is disposed fairly to bring about a representation of the people, or even a representation of property — a representation of anything else than certain districts of country, no matter whether inhabited by men or opossums. Some, no doubt, will be angry with these rude expressions, but "the mischief is" that they are true, that both parties have had the power and yet suffered the outrage to exist unregarded.

nditions rse in rginia.

In Virginia, though the principle is the same, the result is much more objectionable than in Maryland on account of the greater changes that have taken place in the relative population and wealth of counties; and so it now is, that one man in certain of the counties, has as much weight in representation as twenty or thirty, in another; and so also in regard to wealth and extent. The thing was started wrong; and it seems as if the people of Virginia thought there was a merit in continuing in the wrong.

Yet they have taken a lead in our political affairs; are the most strenuous supporters of state rights, and seem most to regard the sovereignty of the people. There is nothing that can be urged in favor of perseverance in a practice so insulting to the dignity of human nature — a practice as intolerant as any of the acts passed by the parliament of Great Britain, which united America resisted — "taxation without representation," which should be resisted by every honorable man.

General irregulariti with regar to the suffrage.

But Maryland and Virginia, though they agree in principle as to the formation of their legislative and executive authorities, are on the opposite extremes as to the way in which that principle shall be brought into action. In the former, every man may vote who has (or says that he has) resided in the state or county such a length of time, if a citizen; and, as in Baltimore, where the places for voting are adjacent, he may vote half a dozen times or more (if he is determined to carry his point), as many have done; for we have nothing that partakes of even the character of a registration of voters — not anything to serve as a check upon the unprincipled; and he who can gain the most of such to his side has the best chance of being elected, when a brisk opposition exists and the passions are excited. On the other hand, none but freeholders vote in Virginia, and none but freeholders ought to fight or pay taxes. But, be the requisition to possess the right of suffrage what it may, it should be so guarded that it cannot be abused — and the voter, in one county or district, ought to have the same influence as a voter in another. And even if a regard to population is waived, and respect is had to wealth only, — the counties should be represented according to the several amounts which they pay into the state treasury, either by direct or indirect taxation. "Equality is equity, conformity is justice," — and there cannot be either equity or justice, when neither population or wealth, severally or jointly, are regarded in a delegation of the power to make laws. All laws so made are repugnant to all the principles that appertain to the rights of man.

33. *An Appeal for the Right to Vote*

Although the Virginia Bill of Rights of 1776 declared that "all power is vested in, and consequently derived from, the people," the Constitution framed at the same time restricted the suffrage to freeholders, and when a new constitutional convention met in 1829, a lengthy memorial from non-freeholders asking for the ballot was laid before the body. This document illustrates the spirit of the wider democracy that sprang up early in the nineteenth century.

The Memorial of the Non-Freeholders of the City of Richmond respectfully addressed to the Convention, now assembled to deliberate on amendments to the State Constitution, 1829.

[ow non-eeholders re shut ut of all olitical fe.

Your memorialists, as their designation imports, belong to that class of citizens, who, not having the good fortune to possess a certain portion of land, are, for that cause only, debarred from the enjoyment of the right of suffrage. Experience has but too clearly evinced, what, indeed, reason had always foretold, by how frail a tenure they hold every other right, who are denied this, the highest prerogative of freemen. The want of it has afforded both the pretext and the means of excluding the entire class, to which your memorialists belong, from all participation in the recent election of the body they now respectfully address. Comprising a very large part, probably a majority of male citizens of mature age, they have been passed by, like aliens or slaves, as if destitute of interest, or unworthy of a voice, in measures involving their future political destiny; whilst the freeholders, sole possessors, under the existing Constitution, of the elective franchise, have, upon the strength of that possession alone, asserted and maintained in themselves, the exclusive power of new-modelling the fundamental laws of the State: in other words, have seized upon the sovereign authority. . . .

To that privilege [of the suffrage], they respectfully contend, they are entitled equally with its present possessors. Many are bold enough to deny their title. None can show a better. It

rests upon no subtle or abstruse reasoning; but upon grounds simple in their character, intelligible to the plainest capacity, and such as appeal to the heart, as well as the understanding, of all who comprehend and duly appreciate the principles of free Government. Among the doctrines inculcated in the great charter handed down to us, as a declaration of the rights pertaining to the good people of Virginia and their posterity, "as the basis and foundation of Government," we are taught,

Grounds for the demand for the suffrage.

Extract from the Virginia Bill of Rights (1776).

"That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity: namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

That all power is vested in, and consequently derived from, the people.

That a majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter or abolish the Government.

That no man, nor set of men, are entitled to exclusive or separate emoluments or privileges, but in consideration of public services.

That all men, having sufficient evidence of permanent common interest with, and attachment to the community, have a right of suffrage, and cannot be taxed, or deprived of their property, without due consent, or that of their representative, nor bound by any law, to which they have not, in like manner, assented, for the public good."

Restricted suffrage contrary to the principles of equalit

How do the principles thus proclaimed, accord with the existing regulation of suffrage? A regulation, which, instead of the equality nature ordains, creates an odious distinction between members of the same community; robs of all share, in the enactment of the laws, a large portion of the citizens, bound by them, and whose blood and treasure are pledged to maintain them, and vests in a favored class, not in consideration of their public services, but of their private possessions, the highest of all privileges; one which, as is now in flagrant proof, if it does not constitute, at least is held practically to confer, absolute sovereignty.

34. *An Argument against Popular Suffrage (1829)* *

When the proposition to establish white male suffrage came before the Virginia convention, Mr. Trezvant opposed the inno-

vation with the following arguments, and in his position he was sustained by a large number of his colleagues. The radical proposal was therefore defeated, but a concession was made to the democratic element by a slight extension of the suffrage.

radical
ange
curs a risk
great
ils.

What is the question under consideration? The object of the amendment is to abolish the present modification of the Right of Suffrage, and to substitute in its place, one entirely new to us. When a people undertake to make a change in their political institutions, affecting the foundation of Government, it behoves them to proceed with the utmost caution and circumspection. We should recollect that we are about to introduce an experiment which is to operate upon the affections, prejudices, and long-established habits of the community, and the consequences cannot be distinctly foreseen or foretold. A numerous population, falling not much short of a million, cannot at once throw off their old usages and customs, and accommodate themselves to an entirely new order of things, radically different from that under which they have lived in peace and tranquillity, without incurring the risk of many and great evils.

ost
ople are
tisfied
th
ings as
ey are.

This Government has existed for more than fifty years, and under it, the people have enjoyed happiness and contentment. There are, it is true, occasional clamors arising from local causes and prejudices, and not from any real defects in the form of Government; and I hope this amendment will not be adopted to allay such complaints. In that part of the State in which I reside I have not heard of any serious complaint touching the Right of Suffrage. The people there, in this respect, at least, are satisfied; why then adopt this new qualification of the Right of Suffrage, which in my poor opinion, would put to hazard the best interests of the country, and even endanger the liberties of the people?

ıe extent
the
ange to
effected
the new
v.

We are called upon to substitute for the Freehold Suffrage, that which, if it be not Universal Suffrage, falls but little short of it. It is proposed that those who are twenty-one years of age, who bear arms, and have resided twelve months in the county in which they propose to vote, should have this right, and the adoption of

the principle amounts in effect, to what I call Universal Suffrage. I was told by one gentleman, (to the correctness of whose statistics I do not, however, feel myself bound to subscribe), that the adoption of this measure would add to the number of voters in the State more than 60,000, the present number being somewhat more than 40,000. Thus, the power of the Government is to be transferred from the hands of the 40,000, who have the deepest interest at stake, to the 60,000, who have comparatively but little interest.

The possession of land the best evidence of permanent interest in the community

It is no idle chimera of the brain, that the possession of land furnishes the strongest evidence of permanent, common interest with, and attachment to, the community. Much has been already said by gentlemen on both sides, demonstrating the powerful influence of local attachment upon the conduct of man, and I cannot be made to comprehend how that passion could be more effectually brought into action, than by a consciousness of the fact, that he is the owner of the spot which he can emphatically call his home. It is upon this foundation I wish to place the Right of Suffrage. This is the best general standard which can be resorted to for the purpose of determining whether the persons to be invested with the Right of Suffrage are such persons as could be, consistently with the safety and well-being of the community, entrusted with the exercise of that right.

35. *The Doctrine of Rotation in Office*

Among the first principles of Jacksonian democracy was the doctrine that all public officers should be elected for short terms and their reëligibility carefully restricted, so that "an office-holding aristocracy" could not be created. In the Pennsylvania constitutional convention of 1837, Mr. Earle summed up the arguments in favor of a short tenure of office.

Long tenure unfits the officer for his duties.

What is the reason that we place any limitation at all upon the term of office? I would ask for reasons why we should ever turn a good man out of office? Is it because the officer has accumulated wealth, and has arrived at a period of life, when retirement and

repose have become necessary? Not at all. The reason is, that long continuance in office unfits a man for the discharge of its duties, by rendering him arbitrary and aristocratic, and tends to beget, first life office, and then hereditary office, which leads to the destruction of free government. This is the reason why the principle of rotation in office has been adopted by republicans; and the moment it is abandoned, life office must follow.

most
ry one is
alified
office.

It might be urged though, as I think, without much force — that the office of Governor and of President ought to be left without limitation, because, in cases of great public emergency, it might be expedient and necessary to continue in office, some incumbent, beyond the limited term, on account of his peculiar fitness for the crisis. But in a small county clerkship, which could be just as well filled by any one of five hundred men in the country, as the incumbent himself, it is preposterous to say that the public necessities require the retention of an officer. It is absurd to say, that the public service requires an unlimited tenure of offices, which any merchant's clerk could, in three days' time, be prepared to fill, as well as your oldest officers; for the easy and simple duties of which no previous study, and no great learning, or experience, are required — and for the discharge of which the officer generally is just about as well fit, on the first day of his service, as on the last. Then, there is no reason to be found, in the nature of the service, which would render an exception from the principle of rotation in office, applicable to these clerks, registers, &c.

fice
lders, if
ligible,
ate
litical
chines.

The only way to secure a quiet and easy application of the principle is to establish a rule making the officer ineligible after a fixed term. Without a rule of this kind, the officers, who are always on the alert and bound together by a common tie of interest, will combine to ensure their re-election. They get up a convention, the delegates to which are selected, and pledged in the dark, and, when they meet, they of course nominate and recommend to the support of the people, those officers whose creatures they are. The people do not know the contrivance, and they are easily en-

trapped by it. The office-holders are leagued, active, and organised, and have possession of all the avenues to public opinion, and of all the machinery of their party. But by making the rule invariable, we can defeat this party organisation, and prevent an official monopoly and aristocracy.

Frequent reëlections will end a life tenure.

In the republic of Geneva, the same men were so often re-elected to office, that the government degenerated into an aristocracy of life office. The people found it more convenient to continue them for life and save the trouble of re-election. The next step was that these life officers, voted that they had power, for the public benefit, to elect their own successors. Of course each parent thought his own children best qualified for the succession, and chose them accordingly; and thus the government became an hereditary aristocracy.

Distinguished American have favored short tenures.

Washington, Jefferson, Franklin and Jackson — men of great minds and most devoted patriotism — as all will agree, whatever may be the difference of opinion concerning their policy, have given their opinions most distinctly in favor of short terms of office. In the Constitution of 1776, which was drawn up by Franklin and approved by the patriots of the revolution, this principle was established and carried out. The eligibility of the members of the Supreme Executive Council was then limited; and the Constitution gives this reason for it: "By this mode of election and continual rotation, by its powers, more men will be trained to public business; there will in every subsequent year be found in the council a number of persons acquainted with the proceedings of the foregoing years, whereby the business will be more consistently conducted, and the danger of establishing an inconvenient aristocracy will be effectually prevented." Many other officers besides the councillors were also limited and for this reason. General Washington, having been twice elected to the highest office in the gift of a free and grateful people, set the example of retiring at the end of the second term, though there was no limitation fixed by the Constitution, to the eligibility of the President.

Mr. Jefferson in his answer to a committee of his fellow citizens

asking him to consent to serve in the office of President for a third term, insists upon the policy and necessity of short terms of office, in a republican Government; confirms the evidence of history as to the tendency of free Governments to degenerate into aristocracy through the influence of life tenures; and declares that, in laying down his charge, he is influenced by a repugnance to doing anything which would tend to impair the vital principle of short terms and frequent elections. General Jackson recommended an alteration of the Constitution, with a view to limit the eligibility of the President to one term. He said that the public interest, generally, suffered more injury, from the long continuance of power in the same hands, than it was benefited by the experience of the individual. An officer, as experience proves, grows worse instead of better, by long continuance in office. The principles which I have referred to, as having been established and supported by the great founders of our free institutions, are the principles of republicanism, and I ask if they are not still the doctrines of Pennsylvania?

36. *Restrictions on Special Legislation* *

The early state legislatures were practically unrestricted in their lawmaking power except by the general terms of the Bill of Rights, and they soon began to abuse their authority by passing special laws granting favors to corporations, discriminating among cities and localities, and exempting private persons from the penalties of general statutes. The sale of this special legislation became one of the most fruitful sources of boss rule and political corruption, and to remedy the intolerable abuses the device was adopted of placing in the state constitution a series of clauses forbidding special legislation in general and particular. The whole question was thoroughly discussed in the Pennsylvania state constitutional convention in 1873, and during the debates the following speech was made against special legislation: —

Now, sir, nothing will strike the people of this State with as much force as this question of barring special legislation; the

people feel more interest in this one subject than any other which this Convention will be called upon to decide. I would therefore say that equal privileges for all, exclusive privileges for none, should be the sentiment of every citizen of this Commonwealth. If we depart from this principle we are at sea without a chart or compass. A general law, granting privileges to incorporate companies, is made for the benefit of the people of the State; the privileges granted thereby may be enjoyed by all the people of every locality in the State. There can be no special monopoly created by pursuing this course. No company can be organized under general laws which can occupy any particular locality or carry on any particular kind of business to the exclusion of all other companies for the same purpose. I am in favor of adopting a principle into our Constitution which will permit all people to combine with the same privileges. I would not give to the Legislature, through this Constitution, power to grant privileges to which all persons are not equally entitled under general law. I would place a restriction on the legislature in this Commonwealth, and say to it, thus far and no farther, so that if one man points his finger at you, and says, "I have a right and privilege under such a law," you can answer him, "so have I." There would seem to be a kind of general fairness in such a principle as this. But when you permit through a Constitution, a legislative body to assemble, and allow them — with hardly a restraint — to pass any act they may choose, to incorporate any company, to establish any special charter, you at once tolerate arrogant legislation. I would, therefore, restrict special legislation by placing around it a proper safeguard, like that which this section suggests, and provide also that all laws of a general nature shall have a uniform operation throughout the State.

The general principle of equal privileges for all.

We have the Constitution of a State before us which seems to checkmate many of the abuses growing out of local legislation. I refer to the Constitution of the State of Illinois. Her revised Constitution of 1870, we find under article four and section twenty-two entitled special legislation, prohibited some twenty or more spe-

The example of Illinois

cific subjects that cannot be bartered and traded away at the mere beck or nod of some unscrupulous lobbyist, who lounges about the State Capitol, whose business it is to manipulate the foul work of their masters. If we adopt this section as reported in this Constitution, we shall receive the thanks of the many whose eyes are now upon us. We may rest assured, unless we meet the expectation of the people of this Commonwealth in some way of this kind, that the work we are doing here will be repudiated by them, and with the advantages they have, they will not be slow in making up their minds, and will be prepared to give their solemn verdict against our work.

ome gures n special gislation.

In looking over the acts which the Legislature has passed for the past few years, say commencing with 1866 and ending with 1872, we find the following results:

In 1866, general laws passed were 50; special laws were 1,096.
In 1867, general laws passed were 86; special laws were 1,392.
In 1868, general laws passed were 73; special laws were 1,150.
In 1869, general laws passed were 77; special laws were 1,276.
In 1870, general laws passed were 54; special laws were 1,276.
In 1871, general laws passed were 81; special laws were 1,353.
In 1872, general laws passed were 54; special laws were 1,232.

So you see that in seven years there were passed 475 general laws and 8755 private acts. The number of acts which the present Legislature of 1873 have passed are many, and I am told will duplicate the number of the acts of any one former year. This is undoubtedly correct, and is but another proof of the necessity for this Convention of adopting this section with all its paragraphs complete. From 1866 to 1871 the legislators passed for railroads, and granted them corporate privileges, some four hundred and fifty special acts, bearing on railroads alone. Those were, perhaps, not all the laws that were passed in which railroads were directly or indirectly interested.

Mr. Chairman, what a fearful commentary is this on the abuses of special legislation! By a restrictive section in this Con-

stitution, the best and largest interests of a free and industrious people like ours, in this State, would be protected. Without it we have not much faith in the ultimate results, for as we are carried forward by the political maelstrom, we shall find that our political rights will be swallowed up by granting special privileges to soulless corporations. Now, sir, what sort of justice, I ask, can there be that will allow the law-making power in this State to change, at each and every session of the Legislature, some act, because a few favored citizens desire it; this ought not to be tolerated for one moment. Necessary legislation is greatly retarded, the expenses to the Commonwealth are greatly enlarged, the assumption of such rights degrades the dignity of any legislative body, and withall impairs the efficiency of legislation for good to the whole people. If you restrict any by law, restrict all under like circumstances.

Public rights ar granted away to private corporati

37. *Recent Tendencies in Constitutional Development*

Among the novel features of the new state constitutions are modifications in the traditional modes of Anglo-Saxon procedure, such as indictment by grand jury and trial by jury; strict limitations on the rights and privileges of corporations; and provisions in favor of the working class. In this respect the recent constitution of Oklahoma deserves careful study because its framers have embodied in it practically all the newer inventions of American politics, among which the following are the most striking: —

Habeas corpus

The privilege of the writ of habeas corpus shall never be suspended by the authorities of this State.

and jury trial.

No person shall be prosecuted criminally in courts of record for felony or misdemeanor otherwise than by presentment or indictment or by information. No person shall be prosecuted for a felony by information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination. Prosecutions may be instituted in courts not of record upon a duly verified complaint.

A grand jury shall be composed of twelve men, any nine of whom concurring may find an indictment or true bill. A grand jury shall be convened upon the order of a judge of a court having the power to try and determine felonies, upon his own motion; or such grand jury shall be ordered by such judge upon the filing of a petition therefor signed by one hundred resident taxpayers of the county; when so assembled such grand jury shall have power to investigate and return indictments for all character and grades of crime, and such other powers as the Legislature may prescribe. Provided, That the Legislature may make the calling of a grand jury compulsory.

The right of trial by jury shall be and remain inviolate, and a jury for the trial of civil and criminal cases in courts of record, other than county courts, shall consist of twelve men; but, in county courts and courts not of record, a jury shall consist of six men. This section shall not be so construed as to prevent limitations being fixed by law upon the right of appeal from judgments of courts not of record in civil cases concerning causes of action involving less than twenty dollars. In civil cases, and in criminal cases less than felonies, three-fourths of the whole number of jurors concurring shall have power to render a verdict. In all other cases the entire number of jurors must concur to render a verdict.

unctions. The Legislature shall pass laws defining contempts and regulating the proceedings and punishment in matters of contempt: Provided, That any person accused of violating or disobeying, when not in the presence or hearing of the court, or judge sitting as such, any order of injunction, or restraint, made or entered by any court or judge of the State shall, before penalty or punishment is imposed, be entitled to a trial by jury as to the guilt or innocence of the accused. In no case shall a penalty or punishment be imposed for contempt, until an opportunity to be heard is given.

blicity cor- rations. Any person having knowledge or possession of facts that tend to establish the guilt of any other person or corporation charged with an offense against the laws of the State, shall not be excused from giving testimony or producing evidence, when legally called

upon so to do, on the ground that it may tend to incriminate him under the laws of the State; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify or produce evidence.

The records, books, and files of all corporations shall be, at all times, liable and subject to the full visitorial and inquisitorial powers of the State, notwithstanding the immunities and privileges in this Bill of Rights secured to the persons, inhabitants, and citizens thereof.

The right of the State to engage in any occupation or business for public purposes shall not be denied nor prohibited, except that the State shall not engage in agriculture for any other than educational and scientific purposes and for the support of its penal, charitable, and educational institutions.

Monopolies. Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this State.

No private corporation shall be created nor foreign corporation licensed to conduct business in the State, except by general law.

Stock watering. No corporation shall issue stock except for money, labor done, or property actually received to the amount of the par value thereof, and all fictitious increase of stock or indebtedness shall be void, and the Legislature shall prescribe the necessary regulations to prevent the issue of fictitious stock or indebtedness. The stock and bonded indebtedness of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock first obtained at a meeting to be held after thirty days' notice given in pursuance of law.

No corporation organized or doing business in this State shall be permitted to influence elections or official duty by contributions of money or anything of value.

Mergers. No corporation chartered or licensed to do business in this State shall own, hold, or control, in any manner whatever, the stock of

any competitive corporation or corporations engaged in the same kind of business, in or out of the State, except such stock as may be pledged in good faith to secure bona fide indebtedness acquired upon foreclosure, execution sale, or otherwise for the satisfaction of debt. In all cases where any corporation acquires stock in any other corporation, as herein provided, it shall be required to dispose of the same within twelve months from the date of acquisition; and during the period of its ownership of such stock it shall have no right to participate in the control of such corporation, except when permitted by order of the Corporation Commission. No trust company, or bank or banking company shall own, hold, or control, in any manner whatever, the stock of any other trust company, or bank or banking company, except such stock as may be pledged in good faith to secure bona fide indebtedness, acquired upon foreclosure, execution sale, or otherwise for the satisfaction of debt; and such stock shall be disposed of in the time and manner hereinbefore provided.

ooks of orporations be open.

No corporation, foreign or domestic, shall be permitted to do business in this State without first filing in the office of the Corporation Commission a list of its stockholders, officers, and directors, with the residence and postoffice address of, and the amount of stock held by each. And every foreign corporation shall, before being licensed to do business in the State, designate an agent residing in the State; and service of summons or legal notice may be had on such designated agent and such other agents as now are or may hereafter be provided for by law. Suit may be maintained against a foreign corporation in the county where an agent of such corporation may be found, or in the county of the residence of plaintiff, or in the county where the cause of action may arise.

onopolies nd dis- imination.

Until otherwise provided by law, no person, firm, association, or corporation engaged in the production, manufacture, distribution, or sale of any commodity of general use, shall, for the purpose of creating a monopoly or destroying competition in trade, discriminate between different persons, associations, or corporations, or different sections, communities, or cities of the State, by

selling such commodity at a lower rate in one section, community, or city than in another, after making due allowance for the difference, if any, in the grade, quantity, or quality, and in the actual cost of transportation from the point of production or manufacture.

Provisions on behalf of labor.

Eight hours shall constitute a day's work in all cases of employment by and on behalf of the State or any county or municipality.

The contracting of convict labor is hereby prohibited.

The employment of children, under the age of fifteen years, in any occupation, injurious to health or morals or especially hazardous to life or limb, is hereby prohibited.

Boys under the age of sixteen years, and women and girls, shall not be employed, underground, in the operation of mines; and, except in cases of emergency, eight hours shall constitute a day's work underground in all mines of the State.

The Legislature shall pass laws to protect the health and safety of employees in factories, in mines, and on railroads.

The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury.

The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation.

Any provision of a contract, express or implied, made by any person, by which any of the benefits of this Constitution, is sought to be waived, shall be null and void.

CHAPTER VI

THE EVOLUTION OF POLITICAL ISSUES IN THE UNITED STATES

The intimate character of government.

A GOVERNMENT is not an abstract thing — a set of rules and regulations. It is at bottom a determinate number of persons set off from the community at large and authorized to discharge certain public duties. Under the modern system of party rule, the general character and policy of the government at any given time depend upon the interests and ideals of the political party which placed the dominant and directing officials in power. "For practical purposes," says Judge Cooley, "the Constitution is that which the government in its several departments and the people in the performance of their duties as citizens recognize and respect as such; and nothing else." Thus it happens that a description of American government which leaves out of account party issues, methods, and organization, fails to reveal both the realities of governmental practice and the opportunities of the citizen to take part in the direction and control of his government.

38. *Federalists and Jeffersonians*

Washington, in common with many of his contemporaries, deplored the introduction of party spirit into American politics, but the new Constitution had hardly gone into effect before the voters and leaders began to differ about practical measures and theoretical doctrines; and over these issues they divided into two groups, Federalists and Jeffersonians. The general views of the two parties are thus characterized by Jefferson: —

Political doctrines of ruling classes in Europe.

The fact is, that at the formation of our government, many had formed their political opinions on European writings and practices, believing the experience of old countries, and especially of England, abusive as it was, to be a safer guide than mere theory. The doctrines of Europe were, that men in numerous

associations cannot be restrained within the limits of order and justice, but by forces physical and moral, wielded over them by authorities independent of their will. Hence their organisation of kings, hereditary nobles, and priests. Still further to constrain the brute force of the people, they deem it necessary to keep them down by hard labor, poverty and ignorance, and to take from them, as from bees, so much of their earnings, as that unremitting labor shall be necessary to obtain a sufficient surplus barely to sustain a scanty and miserable life. And these earnings they apply to maintain their privileged orders in splendor and idleness, to fascinate the eyes of the people, and excite in them an humble adoration and submission, as to an order of superior beings.

The policy of the Federalists.

Although few among us had gone all these lengths of opinion, yet many had advanced, some more, some less, on the way. And in the convention which formed our government, they endeavored to draw the cords of power as tight as they could obtain them, to lessen the dependence of the general functionaries on their constituents, to subject to them those of the States, and to weaken their means of maintaining the steady equilibrium which the majority of the convention had deemed salutary for both branches, general and local. To recover, therefore, in practice the powers which the nation had refused, and to warp to their own wishes those actually given, was the steady object of the Federal party.

Jeffersonian confidence in the wisdom and virtue of the people.

Ours, on the contrary, was to maintain the will of the majority of the convention, and of the people themselves. We believed, with them, that man was a rational animal, endowed by nature with rights, and with an innate sense of justice; and that he could be restrained from wrong and protected in right, by moderate powers, confided to persons of his own choice and held to their duties by dependence on his own will. We believed that the complicated organization of kings, nobles, and priests was not the wisest nor best to effect the happiness of associated man; that wisdom and virtue were not hereditary; that the trappings of such a machinery consumed by their expense those earnings of industry they were meant to protect, and by the inequalities they produced

exposed liberty to sufferance. We believed that men, enjoying in ease and security the full fruits of their own industry, enlisted by all their interests on the side of law and order, habituated to think for themselves, and to follow their reason as their guide, would be more easily and safely governed, than with minds nourished in error, and vitiated and debased, as in Europe, by ignorance, indigence and oppression.

Conclusion.

The cherishment of the people then was our principle, the fear and distrust of them, that of the other party. Composed, as we were, of the landed and laboring interests of the country, we could not be less anxious for a government of law and order than were the inhabitants of the cities, the strongholds of federalism. And whether our efforts to save the principles and form of our constitution have not been salutary, let the present republican freedom, order and prosperity of our country determine.

39. *The Whig Party*

The Whigs a composite party of opposition.

After the second election of Jefferson in 1804, the Federalist party as a fighting organization went to pieces, although it continued for some time to put candidates in the field. With the advent of Andrew Jackson, the victorious party which had then assumed the name "Democratic," raised up a new opposition in the form of the Whig party which succeeded in electing two war heroes, Harrison and Taylor, and then went down before the Republicans because it was unable to meet the impending issue of slavery. Horace Greeley thus enumerates the elements of the Whig party: —

(1) Most of those who, under the name of National Republicans, had previously been known as supporters of Adams and Clay, and advocates of the American system; (2) Most of those who, acting in defense of what they deemed the assailed or threatened rights of the States, had been stigmatized as Nullifiers, or the less virulent State-Rights men, who were thrown into a position of armed neutrality towards the administration by the doctrines of the proclamation of 1832 against South Carolina; (3) A majority

of those before known as Anti-Masons; (4) Many who had up to that time been known as Jackson men, but who united in condemning the high-handed conduct of the Executive, the immolation of Duane, and the subserviency of Taney; (5) Numbers who had not before taken any part in politics, but who were now awakened from their apathy by the palpable usurpations of the Executive, and the imminent peril of our whole fabric of constitutional liberty and national prosperity.

40. *The Democratic Party as the Champion of Slavery*

The evolution in the philosophy of slavery.

In the early days of the Republic, most earnest men looked upon slavery as an evil that would in time disappear; but with the invention of the cotton gin, the development of the tobacco and cotton industry, and the westward expansion of the South, the institution became intrenched behind economic interests so powerful as almost to defy criticism or assault. It was then discovered by Southern political philosophers that slavery was "a natural institution" and the "only relation which could be maintained between whites and blacks," and the South began to force the Democratic party to assume a positive and uncompromising defense of these propositions. As the Richmond *Examiner* put it, "The South makes and unmakes Presidents. She dictates her terms to the Northern Democracy and they obey her. She selects from among the faithful of the North a man on whom she can rely, and she makes him President. . . . In and out of Congress, in the science of politics, she holds the North to her purpose."[1] In the platform of 1852, the Democratic party took the following stand on the slavery issue and foreshadowed disunion: —

Anti-slavery agitation deprecated.

Resolved, That Congress has no power, under the Constitution, to interfere with or control the domestic institutions of the several States, and that such States are the sole and proper judges of everything appertaining to their own affairs not prohibited by the Constitution; that all efforts of the Abolitionists or others, made to induce Congress to interfere with questions of slavery, or to take incipient steps in relation thereto, are calculated to lead to the most

[1] There were about 350,000 slave-holders in a population of 25,000,000.

alarming and dangerous consequences, and that all such efforts have an inevitable tendency to diminish the happiness of the people, and endanger the stability and permanency of the Union and ought not to be countenanced by any friend to our political institutions.

The "Compromise" of 1850 approved.

Resolved, That the foregoing proposition covers and is intended to embrace, the whole subject of slavery agitation in Congress; and therefore the Democratic party of the Union, standing on this national platform, will abide by, and adhere to, a faithful execution of the acts known as the "compromise" measures settled by the last Congress, — "the act for reclaiming fugitives from service or labor" included; which act, being designed to carry out an express provision of the Constitution, cannot with fidelity thereto be repealed, nor so changed as to destroy or impair its efficiency.

Resolved, That the Democratic party will resist all attempts at renewing, in Congress or out of it, the agitation of the slavery question, under whatever shape or color the attempt may be made. . . .

Kentucky and Virginia resolutions approved.

Resolved, That the Democratic party will faithfully abide by and uphold the principles laid down in the Kentucky and Virginia resolutions of 1792 and 1798,[1] and in the report of Mr. Madison to the Virginia legislature in 1799; that it adopts those principles as constituting one of the main foundations of its political creed, and is resolved to carry them out in their obvious meaning and import. . . .

41. *The Platform of the Republican Party in* 1860

The rise of the Republican party.

In 1854 the triumphant pro-slavery party passed the Kansas-Nebraska bill containing a clause expressly repealing the provision of the Missouri Compromise by which slavery had been excluded from the Louisiana Purchase north of a certain line. This action met with a storm of protest not only from abolitionists who were opposed to slavery everywhere, but also from the more moderate Northerners who were content for the time being, at

[1] For the texts of these resolutions, see MacDonald, *Select Documents of United States History, 1776–1861*, pp. 149 *sqq.*

least, to confine their efforts to excluding "the peculiar institution" from the territories. It now became apparent that the slave power could be checked only by a new party founded definitely on some principle of opposition; and the Republican party sprang into existence within an incredibly short time. This party held its first national convention in 1856, and in the fateful year of 1860 selected Lincoln as its presidential leader upon the following declaration of principles: —

Resolved, That we, the delegated representatives of the Republican electors of the United States, in convention assembled, in discharge of the duty we owe to our constituents and our country, unite in the following declarations: —

The party founded on permanent issues.

1. That the history of the nation, during the last four years, has fully established the propriety and necessity of the organization and perpetuation of the Republican party, and that the causes which called it into existence are permanent in their nature, and now, more than ever before, demand its peaceful and constitutional triumph.

The Declaration of Independence affirmed.

2. That the maintenance of the principles promulgated in the Declaration of Independence and embodied in the Federal Constitution, — "that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed" — is essential to the preservation of our republican institutions; and that the federal Constitution, the rights of the States, and the union of the States must and shall be preserved.

The Union to be upheld

3. That to the union of the States this nation owes its unprecedented increase in population, its surprising development of material resources, its rapid augmentation of wealth, its happiness at home, and its honour abroad; and we hold in abhorrence all schemes for disunion, come from whatever source they may; and we congratulate the country that no Republican member of Congress has uttered or countenanced the threats of disunion so often

made by Democratic members, without rebuke and with applause from their political associates; and we denounce those threats of disunion, in case of a popular overthrow of their ascendency, as denying the vital principles of a free government, and as an avowal of contemplated treason, which it is the imperative duty of an indignant people sternly to rebuke and forever silence.

The right of the state to control slavery.

4. That the maintenance inviolate of the rights of the States, and especially the right of each State to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depends; and we denounce the lawless invasion by armed force of the soil of any State or Territory, no matter under what pretext, as among the gravest of crimes.

The Democratic party has become sectional.

5. That the present Democratic administration has far exceeded our worst apprehensions, in its measureless subserviency to the exactions of a sectional interest, as especially evinced in its desperate exertions to force the infamous Lecompton constitution upon the protesting people of Kansas; in construing the personal relation between master and servant to involve an unqualified property in person; in its attempted enforcement everywhere, on land and sea, through the intervention of Congress and of the Federal courts, of the extreme pretensions of a purely local interest; and in its general and unvarying abuse of the power intrusted to it by a confiding people.

6. That the people justly view with alarm the reckless extravagance which pervades every department of the Federal government; that a return to rigid economy and accountability is indispensable to arrest the systematic plunder of the public treasury by favored partisans; while the recent startling development of frauds and corruptions at the Federal metropolis show that an entire change of administration is imperatively demanded.

The principle of the Dred Scott decision.

7. That the new dogma that the Constitution, of its own force, carries slavery into any or all of the Territories of the United States, is a dangerous political heresy, at variance with the explicit provisions of that instrument itself, with contemporaneous exposition,

and with legislative and judicial precedent; is revolutionary in its tendency, and subversive of the peace and harmony of the country.

Congress cannot authorize slavery in the Territories.

8. That the normal condition of all the territory of the United States is that of freedom; that as our republican fathers, when they had abolished slavery in all our national territory, ordained that no person should be deprived of life, liberty, or property without due process of law, it becomes our duty, by legislation, whenever such legislation is necessary, to maintain this provision of the Constitution against all attempts to violate it; and we deny the authority of Congress, of a territorial legislature, or of any individual, to give legal existence to slavery in any territory of the United States.

The slave trade.

9. That we brand the recent reopening of the African slave-trade, under the cover of our national flag, aided by perversions of judicial power, as a crime against humanity, and a burning shame to our country and age; and we call upon Congress to take prompt and efficient measures for the total and final suppression of that execrable traffic.

10. That in the recent vetoes, by their federal governors, of the acts of the legislatures of Kansas and Nebraska, prohibiting slavery in those Territories, we find a practical illustration of the boasted Democratic principle of non-intervention and popular sovereignty, embodied in the Kansas-Nebraska Bill, and a demonstration of the deception and fraud involved therein.

11. That Kansas should of right be immediately admitted as a State under the Constitution recently formed and adopted by her people and accepted by the House of Representatives.

Protective tariff.

12. That, while providing revenue for the support of the general government by duties upon imports, sound policy requires such an adjustment of these imposts as to encourage the development of the industrial interests of the whole country; and we commend that policy of national exchanges which secures to the workingmen liberal wages, to agriculture remunerating prices, to mechanics and manufacturers an adequate reward for their skill, labor, and enterprise, and to the nation commercial prosperity and independence.

Land policy.

13. That we protest against any sale or alienation to others of the public lands held by actual settlers, and against any view of the free-homestead policy which regards the settlers as paupers or suppliants for public bounty; and we demand the passage by Congress of the complete and satisfactory homestead measure which has already passed the House.

Immigration.

14. That the Republican party is opposed to any change in our naturalization laws, or any state legislation by which the rights of citizenship hitherto accorded to immigrants from foreign lands shall be abridged or impaired; and in favor of giving a full and efficient protection to the rights of all classes of citizens, whether native or naturalized, both at home and abroad.

Public improvements.

15. That appropriations by Congress for river and harbor improvements of a national character, required for the accommodation and security of our existing commerce, are authorized by the Constitution, and justified by the obligations of government to protect the lives and property of its citizens.

16. That a railroad to the Pacific Ocean is imperatively demanded by the interests of the whole country; that the federal government ought to render immediate and efficient aid in its construction; and that, as preliminary thereto, a daily overland mail should be promptly established.

17. Finally, having thus set forth our distinctive principles and views, we invite the coöperation of all citizens, however differing on other questions, who substantially agree with us in their affirmance and support.

42. *The Republican Party and War Politics*

Development of organization within the Republican party.

During the Civil War the Republican party, which had been carried into power by a minority vote,[1] became consolidated into a great political organization controlling the federal offices and enjoying all the prerogatives and emoluments connected with them. For a long time after the war the party made its principal appeal to the inflamed passions which the struggle had left behind,

[1] This was due to the division among the Democrats in 1860.

and steadily refused to recognize and effectively meet many of the most pressing political issues. In 1876, when it had been sadly discredited in many ways by the corruption which had undoubtedly prevailed under the Grant administrations, and was on the edge of defeat, as the election subsequently revealed, the Republican party put forward the following claim upon the voters for support: —

How the party came to power.

When, in the economy of Providence, this land was to be purged of human slavery, and when the strength of government of the people, by the people, and for the people, was to be demonstrated, the Republican party came into power. Its deeds have passed into history, and we look back to them with pride. Incited by their memories to high aims for the good of our country and mankind, and looking to the future with unfaltering courage, hope, and purpose, we, the representatives of the party in national convention assembled, make the following declaration of principles: —

The function of the party to uphold personal rights

1. The United States of America is a nation, not a league. By the combined workings of the national and state governments, under their respective constitutions, the rights of every citizen are secured, at home and abroad, and the common welfare promoted.

2. The Republican party has preserved these governments to the hundredth anniversary of the nation's birth, and they are now embodiments of the great truths spoken at its cradle, "That all men are created equal; that they are endowed by their Creator with certain unalienable rights, among which are life, liberty, and the pursuit of happiness; that for the attainment of these ends governments have been instituted among men, deriving their just powers from the consent of the governed." Until these truths are cheerfully obeyed, or, if need be, vigorously enforced, the work of the Republican party is unfinished.

The work of reconstruction to be completed.

3. The permanent pacification of the Southern section of the Union, and the complete protection of all its citizens in the free enjoyment of all their rights, is a duty to which the Republican party stands sacredly pledged. The power to provide for the

enforcement of the principles embodied by the recent constitutional amendments is vested by those amendments in the Congress of the United States, and we declare it to be the solemn obligation of the legislative and executive departments of the government to put into immediate and vigorous exercise all their constitutional powers for removing any just causes of discontent on the part of any class, and for securing to every American citizen complete liberty and exact equality in the exercise of all civil, political, and public rights. To this end we imperatively demand a Congress and a Chief Executive whose courage and fidelity to these duties shall not falter until these results are placed beyond dispute or recall.

Sectional feeling deprecated.

15. We sincerely deprecate all sectional feeling and tendencies. We therefore note with deep solicitude that the Democratic party counts, as its chief hope of success, upon the electoral vote of a united South, secured through the efforts of those who were recently arrayed against the nation; and we invoke the earnest attention of the country to the grave truth that a success thus achieved would reopen sectional strife and imperil national honor and human rights.

The Democratic party in sympathy with treason.

16. We charge the Democratic party with being the same in character and spirit as when it sympathized with treason; with making its control of the House of Representatives the triumph and opportunity of the nation's recent foes; with reasserting and applauding in the national Capitol the sentiments of unrepentant rebellion; with sending Union soldiers to the rear, and promoting Confederate soldiers to the front; with deliberately proposing to repudiate the plighted faith of the government; with being equally false and imbecile upon the overshadowing financial questions; with thwarting the ends of justice by its partisan mismanagement and obstruction of investigation; with proving itself, through the period of its ascendency in the lower House of Congress, utterly incompetent to administer the government; and we warn the country against trusting a party thus alike unworthy, recreant, and incapable. . . .

43. *The Character of Democratic Opposition in 1884*

The Democratic party, having gained strength by the restoration of white supremacy in the South, was quick to take advantage of the weaknesses in the Republican administration and, marshaling its own vote together with that of the discontented Republicans, was able to carry the election in 1884 principally upon a platform of protest, containing the following indictment of the opposing party: —

Republican theory and practice.

The Republican party, so far as principle is concerned, is a reminiscence. In practice it is an organization for enriching those who control its machinery. The frauds and jobbery which have been brought to light in every department of the government are sufficient to have called for reform within the Republican party; yet those in authority, made reckless by the long possession of power, have succumbed to its corrupting influence, and have placed in nomination a ticket against which the independent portion of the party are in open revolt. Therefore a change is demanded. Such a change was alike necessary in 1876, but the will of the people was then defeated by a fraud which can never be forgotten nor condoned. Again, in 1880, the change demanded by the people was defeated by the lavish use of money contributed by unscrupulous contractors and shameless jobbers, who had bargained for unlawful profits or high office. The Republican party, during its legal, its stolen, and its bought tenures of power, has steadily decayed in moral character and political capacity.

Republican promises and performances.

Its platform promises are now a list of its past failures. It demands the restoration of our navy; it has squandered hundreds of millions to create a navy that does not exist. It calls upon Congress to remove the burdens under which American shipping has been depressed; it imposed and has continued these burdens. It professes the policy of reserving the public lands for small holdings by actual settlers; it has given away the people's heritage, till now a few railroads and non-resident aliens, individual and corporate, possess a larger area than that of all our farms between the two seas. It professes a preference for free institutions; it

organized and tried to legalize a control of state elections by federal troops. It professes a desire to elevate labor; it subjected American workingmen to the competition of convict and imported contract labor. . . . It "accepts anew the duty of leading in the work of progress and reform;" its caught criminals are permitted to escape through contrived delays or actual connivance in the prosecution. Honey-combed with corruption, out-breaking exposures no longer shock its moral sense. Its honest members, its independent journals, no longer maintain a successful contest for authority in its canvasses or a veto upon bad nominations. That change is necessary is proved by an existing surplus of more than $100,000,000, which has yearly been collected from a suffering people. Unnecessary taxation is unjust taxation. We denounce the Republican party for having failed to relieve the people from crushing war taxes, which have paralyzed business, crippled industry, and deprived labor of employment and of just reward.

Democratic promises.

The Democracy pledges itself to purify the administration from corruption, to restore economy, to revive respect for law, and to reduce taxation to the lowest limit consistent with due regard to the preservation of the faith of the nation to its creditors and pensioners. Knowing full well, however, that legislation affecting the occupations of the people should be cautious and conservative in method, not in advance of public opinion, but responsive to its demands, the Democratic party is pledged to revise the tariff in a spirit of fairness to all interests. But, in making reduction in taxes, it is not proposed to injure any domestic industries, but rather to promote their healthy growth. From the foundation of this government, taxes collected at the custom-house have been the chief source of federal revenue. Such they must continue to be. Moreover, many industries have come to rely upon legislation for successful continuance, so that any change of law must be at every step regardful of the labor and capital thus involved. The process of reform must be subject in the execution to this plain dictate of justice: all taxation shall be limited to the requirements of economical government. The necessary reduction in taxation

can and must be effected without depriving American labor of the ability to compete successfully with foreign labor, and without imposing lower rates of duty than will be ample to cover any increased cost of production which may exist in consequence of the higher rate of wages prevailing in this country. Sufficient revenue to pay all the expenses of the federal government, economically administered, including pensions, interest and principal of the public debt, can be got under our present system of taxation from custom-house taxes on fewer imported articles, bearing heaviest on articles of luxury, and bearing lightest on articles of necessity. We therefore denounce the abuses of the existing tariff; and, subject to the preceding limitations, we demand that federal taxation shall be exclusively for public purposes, and shall not exceed the needs of the government economically administered. . . .

44. *The Social Cleavage of 1896*

A turning point came in American politics in 1896, when Mr. Bryan, in his famous speech before the Democratic convention in Chicago, swept aside the century-long sectional issues and made an appeal to the broad masses of the people to unite against the great financial and corporate interests.

The workingmen and small merchants.

. . . We stand here representing people who are the equals before the law of the largest cities in the State of Massachusetts. When you come before us and tell us that we shall disturb your business interests, we reply that you have disturbed our business interests by your action. We say to you that you have made too limited in its application the definition of a business man. The man who is employed for wages is as much a business man as his employer. The attorney in a country town is as much a business man as the corporation counsel in a great metropolis. The merchant at the cross-roads store is as much a business man as the merchant of New York. The farmer who goes forth in the morning and toils all day, begins in the spring and toils all summer, and by the application of brain and muscle to the natural resources of this country creates wealth, is as much a business man as the man who

goes upon the Board of Trade and bets upon the price of grain. The miners who go a thousand feet into the earth or climb 2,000 feet upon the cliffs and bring forth from their hiding places the precious metals to be poured in the channels of trade are as much business men as the few financial magnates who in a back room corner the money of the world.

Praise for the Western pioneers.

We come to speak for this broader class of business men. Ah, my friends, we say not one word against those who live upon the Atlantic coast; but those hardy pioneers who braved all the dangers of the wilderness, who have made the desert to blossom as the rose — those pioneers away out there, rearing their children near to nature's heart, where they can mingle their voices with the voices of the birds — out there where they have erected school houses for the education of their children and churches where they praise their Creator, and the cemeteries where sleep the ashes of their dead — are as deserving of the consideration of this party as any people in this country.

It is for these that we speak. We do not come as aggressors. Our war is not a war of conquest. We are fighting in the defense of our homes, our families and posterity. We have petitioned, and our petitions have been scorned. We have entreated and our entreaties have been disregarded. We have begged and they have mocked when our calamity came. We beg no longer; we entreat no more; we petition no more. We defy them. . . .

Democratic party on the side of the masses.

Mr. Carlisle said in 1878 that this was a struggle between the idle holders of idle capital and the struggling masses who produce the wealth and pay the taxes of the country; and my friends, it is simply a question that we shall decide upon which side shall the Democratic party fight. Upon the side of the idle holders of idle capital, or upon the side of the struggling masses? That is the question that the party must answer first; and then it must be answered by each individual hereafter. The sympathies of the Democratic party, as described by the platform, are on the side of the struggling masses, who have ever been the foundation of the Democratic party.

There are two ideas of government. There are those who believe that if you just legislate to make the well-to-do prosperous that their prosperity will leak through on those below. The Democratic idea has been that if you legislate to make the masses prosperous, their prosperity will find its way up and through every class that rests upon it. Democrat theory of prosperity

You come to us and tell us that the great cities are in favor of the gold standard. I tell you that the great cities rest upon these broad and fertile prairies. Burn down your cities and leave our farms, and your cities will spring up again as if by magic. But destroy our farms and the grass will grow in the streets of every city in this country. . . .

If they dare to come out and in the open defend the gold standard as a good thing, we shall fight them to the uttermost, having behind us the producing masses of the Nation and the world. Having behind us the commercial interests and the laboring interests and all the toiling masses, we shall answer their demands for a gold standard by saying to them, you shall not press down upon the brow of labor this crown of thorns. You shall not crucify mankind upon a cross of gold. The challenge.

45. *Contemporary Political Issues*

The following extracts from the Republican platform of 1908 reveal the tendency of the older issues growing out of the Civil War and Reconstruction to disappear before the rise of the newer questions connected with the growth of industry and commerce, the relations of capital and labor, the government of our dependencies, and the conservation of our natural resources. The passages given here should be compared with Mr. Taft's acceptance speech and with the platforms of the other parties.

We favor the establishment of a postal savings bank system for the convenience of the people and the encouragement of thrift. Postal savings.

The Republican Party passed the Sherman Anti-Trust law over Democratic opposition, and enforced it after Democratic dereliction. It has been a wholesome instrument for good in the hands of a wise Trusts.

and fearless administration. But experience has shown that its effectiveness can be strengthened and its real objects better attained by such amendments as will give to the Federal Government greater supervision and control over, and secure greater publicity in, the management of that class of corporations engaged in interstate commerce having power and opportunity to effect monopolies.

ilroads. We approve the enactment of the railroad rate law and the vigorous enforcement by the present administration of the statutes against rebates and discriminations, as a result of which the advantages formerly possessed by the large shipper over the small shipper have substantially disappeared; and in this connection we commend the appropriation by the present Congress to enable the Interstate Commerce Commission to thoroughly investigate and give publicity to the accounts of interstate railroads. We believe, however, that the interstate commerce law should be further amended so as to give railroads the right to make and publish traffic agreements subject to the approval of the Commission, but maintaining always the principle of competition between naturally competing lines and avoiding the common control of such lines by any means whatsoever. We favor such national legislation and supervision as will prevent the future over-issue of stocks and bonds by interstate carriers.

lroad
l govern-
nt em-
yees. The enactment in constitutional form at the present session of Congress of the Employers' Liability law, the passage and enforcement of the safety appliance statutes, as well as the additional protection secured for engineers and firemen, the reduction in the hours of labor of trainmen and railroad telegraphers, the successful exercise of the powers of mediation and arbitration between interstate railroads and their employees, and the law making a beginning in the policy of compensation for injured employees of the Government, are among the most commendable accomplishments of the present administration. But there is further work in this direction yet to be done, and the Republican Party pledges its continued devotion to every cause that makes for safety and the

betterment of conditions among those whose labor contributes so much to the progress and welfare of the country.

Wage earners generally

The same wise policy which has induced the Republican Party to maintain protection to American labor, to establish an eight-hour day in the construction of all public works, to increase the list of employees who shall have preferred claims for wages under the bankruptcy laws, to adopt a child labor statute for the District of Columbia, to direct an investigation into the condition of working women and children, and later, of employees of telephone and telegraph companies engaged in interstate business, to appropriate $150,000 at the recent session of Congress in order to secure a thorough inquiry into the causes of catastrophes and loss of life in the mines and to amend and strengthen the law prohibiting the importation of contract labor, will be pursued in every legitimate direction within Federal authority to lighten the burdens and increase the opportunity for happiness and advancement of all who toil. The Republican Party recognizes the special needs of wage-workers generally, for their well being means the well being of all. But more important than all other considerations is that of good citizenship, and we especially stand for the needs of every American, whatever his occupation, in his capacity as a self-respecting citizen.

The Am can farm

The Republican Party during the last twelve years has accomplished extraordinary work in bringing the resources of the National Government to the aid of the farmer, not only in advancing agriculture itself, but in increasing the conveniences of rural life. Free rural mail delivery has been established; it now reaches millions of our citizens, and we favor its extension until every community in the land receives the full benefits of the postal service. We recognize the social and economical advantages of good country roads, maintained more and more largely at public expense, and less and less at the expense of the abutting owner. In this work we commend the growing practice of State aid, and we approve the efforts of the National Agricultural Department by experiments and otherwise to make clear to the public the best methods of road construction.

ural
ources
erways.

We indorse the movement inaugurated by the administration for the conservation of natural resources; we approve all measures to prevent the waste of timber; we commend the work now going on for the reclamation of arid lands, and reaffirm the Republican policy of the free distribution of the available areas of the public domain to the landless settler. No obligation of the future is more insistent and none will result in greater blessings to posterity. In line with this splendid undertaking is the further duty, equally imperative, to enter upon a systematic improvement upon a large and comprehensive plan, just to all portions of the country, of the waterways, harbors, and great lakes, whose natural adaptability to the increasing traffic of the land is one of the greatest gifts of a benign Providence.

itration
The
gue
aties.

The conspicuous contributions of American statesmanship to the great cause of international peace, so signally advanced in The Hague conferences, are an occasion for just pride and gratification. At the last session of the Senate of the United States, eleven Hague conventions were ratified, establishing the rights of neutrals, laws of war on land, restriction of submarine mines, limiting the use of force for the collection of contractual debts, governing the opening of hostilities, extending the application of Geneva principles, and, in many ways lessening the evils of war and promoting the peaceful settlement of international controversies. At the same session twelve arbitration conventions with great nations were confirmed, and extradition, boundary and naturalization treaties of supreme importance were ratified. We indorse such achievements as the highest duty a people can perform and proclaim the obligation of further strengthening the bonds of friendship and good will with all nations of the world.

rchant
rine

We adhere to the Republican doctrine of encouragement to American shipping and urge such legislation as will revive the merchant marine prestige of the country, so essential to national defense, the enlargement of foreign trade and the industrial prosperity of our own people.

We commend the efforts designed to secure greater efficiency in

National public health agencies, and favor such legislation as will effect this purpose.

In the interest of the great mineral industries of our country, we earnestly favor the establishment of a Bureau of Mines and Mining.

Cuba, Porto Rico, Philippines, and Panama.

The American Government, in Republican hands, has freed Cuba, given peace and protection to Porto Rico and the Philippines under our flag, and begun the construction of the Panama Canal. The present conditions in Cuba vindicate the wisdom of maintaining between that Republic and this imperishable bonds of mutual interest, and the hope is now expressed that the Cuban people will soon again be ready to assume complete sovereignty over their land.

In Porto Rico the Government of the United States is meeting loyal and patriotic support; order and prosperity prevail, and the well being of the people is in every respect promoted and conserved.

We believe that the native inhabitants of Porto Rico should be at once collectively made citizens of the United States, and that all others properly qualified under existing laws residing in said island should have the privilege of becoming naturalized.

In the Philippines insurrection has been suppressed, law established and life and property made secure. Education and practical experience are there advancing the capacity of the people for government, and the policies of McKinley and Roosevelt are leading the inhabitants step by step to an ever-increasing measure of home rule.

Time has justified the selection of the Panama route for the great Isthmian Canal, and the events have shown the wisdom of securing authority over the zone through which it is to be built. The work is now progressing with a rapidity far beyond expectation, and already the realization of the hopes of centuries has come within the vision of the near future.

CHAPTER VII

THE DEVELOPMENT OF PARTY MACHINERY

The evolution of nominating machinery.

THE nomination of candidates for local offices and the legislature was made at first in mass meetings, which very soon evolved into regularly constituted conventions. Owing to the difficulties of travel, state conventions were for a long time well nigh impossible, so that the politicians of each party hit upon the scheme of forming all the party members in the state legislature into a "legislative caucus" for the purpose of putting forward the candidates for state offices. For example, Jay was nominated for governor of New York "at a sort of a legislative caucus" in 1795, and the institution soon won general recognition. The following account of the nomination of DeWitt Clinton for governor in 1817 reveals the curious device of supplementing the legislative caucus by delegates elected from districts not represented in the legislature by party members. It may be said to mark a stage between the legislative caucus and the regular state convention.

46. *The Legislative Nominating Caucus*

Unfair features of the legislative caucus.

It had been the uniform usage of the democratic party to select their candidate for governor, by the majority of voices declared at an assemblage of men composed exclusively of the republican members of the legislature. By this arrangement those republican citizens who resided in counties represented by federalists, could have no voice in the selection of a candidate for that important office. This the Clintonians complained of as unreasonable and unjust. They therefore proposed that delegates should be chosen in county convention, which convention should be formed of delegates chosen at the primary meetings of republicans in the respective towns, and that the delegates thus chosen from the counties equal in number to the members of assembly from the respective

counties, should, in a caucus to nominate a governor, have the same rights and exercise the same powers as republican members of the legislature. It was, I believe, well understood, that in the greatest proportion of the counties represented by federalists, a very large majority of the republicans were in favor of the nomination of Mr. Clinton. Besides, the Clintonians, by means of the council of appointment, controlled the patronage of the state, and it was not difficult for a man who understood the use of that machine as well as Judge Spencer, to control by its influence, the action of most of the county conventions. Hence, it was most evident that the adoption of the scheme could scarcely fail to forward, and perhaps, I may add, ensure the triumph of Mr. Clinton.

Delegates chosen for counties represented by Federalists.

In accordance with these views, a republican convention was first held in the county of Albany, at which John J. Moak was chairman, and Jacob Lansing secretary, on the fourth of February, when it was resolved that the counties represented by federalists in the legislature, ought to be represented in the state convention to nominate a governor by republican delegates chosen by such counties; and Albany being represented by federalists, John Woodworth, Elisha Jenkins, John McCarthy and Thomas Harman were appointed delegates from the county of Albany. Other counties respectable for their wealth, number and influence, followed the example.

Character of the delegates.

The delegates to the state convention thus chosen were generally favorable to the nomination of Mr. Clinton; and like the delegates from the county of Albany were composed of republicans of high standing and character. From the county of Oneida, Nathan Williams, and Henry Huntington were chosen, and from the county of Ontario, Gideon Granger, the late eminent and distinguished postmaster general, was a delegate.

Preliminaries to the caucus.

One difficulty which Mr. Van Buren and his friends had to encounter, was to fix upon an opposing candidate to Mr. Clinton in caucus. Who was the man that would accept the post and combine the greatest strength, was a question not easy to be judiciously decided. They finally fixed on Judge Yates. He had

adhered to, and defended Mr. Clinton long after he had been denounced by Judge Spencer. On his circuit the preceding summer, he had in various places urged his friends to support the nomination of Clinton. It was supposed that the known friendship of Judge Yates to Mr. C. would induce some of the latter to support the former; but a different result was produced. Men felt indignant when they were invited to support a man in opposition, who had himself taken pains and been instrumental in convincing them that Clinton ought to be chosen governor. A day or two before the meeting of the state convention, Judge Yates positively declined being a candidate. This produced some confusion in the ranks of the opposition, but they finally fixed upon Gen. Peter B. Porter as their candidate.

Clinton nominated.

The state convention was held at the capitol on the 25th March. Upon balloting for a candidate, Mr. Clinton received eighty-five votes and Gen. Porter forty-one. It was understood that sixty members and twenty-five delegates voted for Mr. Clinton, and thirty-three members and seven delegates for his opponent.

47. *The Congressional Caucus for Nominating Presidential Candidates* *

In 1800, the Federalists in Congress held a secret conference to agree on candidates and thus present a solid front to the Jeffersonians. This scheme, denounced at the time by the opposite party, was, however, speedily adopted as a regular institution for nominating presidential candidates, and it lasted until the election of 1824, when it gave way before the popular uprising in favor of Andrew Jackson. The following official record of the caucus of 1824 shows how the system worked: —

Chamber of the House of Representatives of the United States.

February 14, 1824.

Election of officers.

At a meeting of the republican members of Congress, assembled this evening, pursuant to public notice, for the purpose of recommending to the people of the United States suitable persons to be

supported at the approaching election, for the offices of president and vice-president of the United States:

On motion of Mr. James Barbour, of Virginia —

Mr. Benjamin Ruggles, a senator from the state of Ohio, was called to the chair, and Mr. Ela Collins, a representative from the state of New York, was appointed secretary.

The ballo ing for Presidenl

Resolved, That this meeting do now proceed to designate, by ballot, a candidate for president of the United States.

Determined in the affirmative.

On motion of Mr. Van Buren of New York, it was

Resolved, That the Chairman call up the republican members of congress by states, in order to receive their respective ballots.

Whereupon the Chairman proceeded to a call, and it appeared the following members were present. . . .

Counting the ballo

Mr. Bassett, of Virginia, and Mr. Cambreleng, of New York, were appointed tellers, and, on counting the ballots, it appeared that

William H. Crawford had sixty-four votes,

John Quincy Adams two votes,

Andrew Jackson one vote, and

Nathaniel Macon one vote.

The vice-president nominati

Mr. Dickinson of New Jersey then submitted the following resolution, which was agreed to:

Resolved, That this meeting do now proceed to designate, by ballot, a candidate for the office of vice president of the United States.

Mr. Van Buren, of New York, then stated that he was authorized to say that the vice president having, some time since, determined to retire from public life, did not wish to be regarded by his friends as a candidate for reëlection to that office.

On counting the ballots, it appeared that Albert Gallatin, of Pennsylvania, had fifty-seven votes; John Q. Adams of Massachusetts, one vote; William Eustis of Massachusetts, one vote; Samuel Smith of Maryland, one vote; William King of Maine, one vote; Richard Rush of Pennsylvania, one vote; Erastus Root

of New York, two votes; John Tod of Pennsylvania, one vote; and Walter Lowrie of Pennsylvania, one vote.

And, thereupon, Mr. Clark of New York submitted the following resolution, to wit:

ominees com- ended to e voters.

Resolved, As the sense of this meeting that William H. Crawford, of Georgia, be recommended to the people of the United States as a proper candidate for the office of president, and Albert Gallatin, of Pennsylvania for the office of vice president of the United States, for four years from the 4th of March 1825.

Resolved, that, in making the foregoing recommendation, the members of this meeting have acted in their individual characters, as citizens; that they have been induced to this measure from a deep and settled conviction of the importance of union among republicans, throughout the United States, and, as the best means of collecting and concentrating the feelings and wishes of the people of the union, upon this important subject. The question being put upon these resolutions, they were unanimously agreed to.

he address the ople.

Mr. Holmes of Maine then moved that the proceedings of the meeting be signed by the chairman and secretary, and published, together with an address to the people of the United States, to be prepared by a committee to be appointed for the purpose.

On motion, it was ordered that this committee consist of the chairman and secretary of the convention, together with the gentlemen whose names were signed to the notice calling the meeting.

On motion, it was further

otification the ndidates.

Resolved, That the chairman and secretary inform the gentlemen nominated for the offices of president and vice president of their nomination, and learn from them whether they are willing to serve in the said offices, respectively.

BENJAMIN RUGGLES, Chairman.

E. COLLINS, Secretary.

48. *The Tennessee Legislature Protests against the Caucus*

Jackson's followers were enraged with the caucus system, because they believed that he was the real choice of the nation and

had been excluded from the presidency by the action of his personal enemies at Washington. In the legislature of Jackson's state, the following protest against the caucus system was introduced, by Mr. Grundy, a Jackson man: —

The cauc contrary the Const tution.

The general assembly of the state of Tennessee has taken into consideration the practice which, on former occasions, has prevailed at the city of Washington, of members of the congress of the United States meeting in caucus, and nominating persons to be voted for as president and vice-president of the United States: and, upon the best view of the subject which this general assembly has been enabled to take, it is believed that the practice of congressional nominations is a violation of the spirit of the constitution of the United States.

The prin ples of th separatio of power violated.

That instrument provides that there shall be three separate and distinct departments of the government, and great care and caution seems to have been exercised by its framers to prevent any one department from exercising the smallest degree of influence over another; and such solicitude was felt on this subject, that, in the second section of the second article, it is expressly declared, "That no *senator or representative*, or person holding an office of trust or profit under the United States, shall be appointed an elector." From this provision, it is apparent that the convention intended that the members of congress should not be the principal and primary agents or actors in electing the president and vice-president of the United States — so far from it, they are expressly disqualified from being placed in a situation to vote for those high officers. Is there not more danger of undue influence to be apprehended when the members of congress meet in caucus and mutually and solemnly pledge themselves to support the individuals who may have the highest number of votes in such meeting than there would be in permitting them to be eligible to the appointment of electors? In the latter case, a few characters, rendered ineligible by the constitution, might succeed; but, in the former, a powerful combination of influential men is formed, who may fix upon the American people their highest officers against the consent of a clear

majority of the people themselves; and this may be done by the very men whom the constitution intended to prohibit from acting on the subject. Upon an examination of the constitution of the United States, there is but one case in which the members of congress are permitted to act, which is in the event of a failure to make an election by the electoral colleges; and then the members of the house of representatives vote by states. With what propriety the same men, who, in the year 1825, may be called on to discharge a constitutional duty, can, in the year 1824, go into a caucus and pledge themselves to support the men then nominated, cannot be discerned, especially when it might so happen that the persons thus nominated, could under any circumstances, obtain a single vote from the state whose members stand pledged to support them. . . .

ıe inde-
ndence of
e execu-
'e is de-
oyed.

This practice is considered objectionable on other accounts: so long as congress is considered as composed of the individuals on whom the election depends, the executive will is subjected to the control of that body, and it ceases, in some degree, to be a separate and independent branch of the government; and an expectation of executive patronage may have an unhappy influence on the deliberations of congress.

)nclusion.

Upon a review of the whole question, the following reasons which admit of much amplification and enlargement, more than has been urged in the foregoing, might be conclusively relied on, to prove the impolicy and unconstitutionality of the congressional nominations of candidates for the presidency and vice-presidency of the United States: 1st. A caucus nomination is against the spirit of the constitution. 2d. It is both inexpedient and impolitic. 3d. Members of congress may become the final electors, and therefore ought not to prejudge the case by pledging themselves previously to support particular candidates. 4th. It violates the equality intended to be secured by the constitution to the weaker states. 5th. Caucus nominations may, in time, (by the interference of the states), acquire the force of precedents and become authoritative, and thereby endanger the liberties of the American people.

49. *Jackson's First National Convention*

Circumstances under which the convention was called

The first national party convention was held at Baltimore in 1831 by the Anti-Masonic party, which sprang up suddenly in opposition to Free Masonry and as speedily disappeared. The second convention was held in the same year by the Anti-Jacksonians, who nominated Clay and assumed the name of National Republicans. It was, of course, settled that Jackson should be his own successor; but he was extremely anxious to have his friend Van Buren nominated for the vice presidency. Accordingly, he contrived, through his agent, Amos Kendall, to have a national convention called "spontaneously" by his supporters in the New Hampshire legislature. On this call an assembly of delegates "fresh from the people" met at Baltimore and nominated Van Buren, as had been contemplated. The purpose of the assembly was set forth by Mr. Sumner in the opening address, which follows: —

The origin of the convention.

GENTLEMEN — The proposition for calling a general convention of delegates, to act on the nomination of a candidate for president, and to select a suitable candidate for the office of vice-president of the United States, originated in the state of New Hampshire, by the friends of democracy in that state; and it appears that the proposition, although opposed by the enemies of the democratic party, has found favor in nearly and perhaps all the states in the union; so that we find collected at this time and place a greater and more general delegation from the people than was ever before assembled upon an occasion of the sort.

The purpose of the meeting a unic of all elements.

The object of the representatives of the people of New Hampshire who called this convention was, not to impose on the people, as candidates for either of the two first offices in this government, any local favorite; but to concentrate the opinions of all the states. They believed that the great body of the people, having but one common interest, can and will unite, in the support of important principles; that the operation of the machinery of government confined within its legitimate sphere is the same in the north, south, east and west; that although designing men, ever since the adoption of the constitution, have never ceased in their exertions to excite sectional feeling and sectional interest, and to array one

portion of the country against another, the great and essential interests of all are the same. They believed that the coming together of representatives of the people from the extremity of the union, would have a tendency to soothe, if not to unite, the jarring interests, which sometimes come in conflict, from the different sections of the country.

xample
ır the
e.

They considered the individuals, who might be selected as candidates for office, to be of much less consequence than the principle on which they are designated; they thought it important to ascertain the fact, whether the people themselves, or those who would frustrate the voice of the people, should succeed in our elections. They believed that the example of this convention would operate favorably in future elections; that the people would be disposed, after seeing the good effects of this convention in conciliating the different and distant sections of the country, to continue this mode of nomination.

50. *Benton's Criticism of the Convention System*

origin
all of
aucus
n.

The convention system which appeared to be such a popular institution, compared with the congressional caucus, nevertheless encountered the same objections; namely, that it was a mode by which a small group of politicians could control presidential nominations. Senator Benton advanced this view shortly after the convention had been adopted as a permanent institution.

This presidential election of 1824 is remarkable under another aspect — as having put an end to the practice of caucus nominations for the Presidency by members of Congress. This mode of concentrating public opinion began to be practised as the eminent men of the Revolution, to whom public opinion awarded a preference, were passing away, and when new men, of more equal pretensions, were coming upon the stage. It was tried several times with success and general approbation, public sentiment having been followed, and not led, by the caucus. It was attempted in 1824, and failed, the friends of Mr. Crawford only attending — others not attending, not from any repugnance to the practice,

as their previous conduct had shown, but because it was known that Mr. Crawford had the largest number of friends in Congress and would assuredly receive the nomination. All the rest, therefore, refused to go into it: all joined in opposing the "caucus candidate," as Mr. Crawford was called; all united in painting the intrigue and corruption of these caucus nominations, and the anomaly of members of Congress joining in them. By their joint efforts they succeeded, and justly in the fact though not in the motive, in rendering these Congress caucus nominations odious to the people, and broke them down.

The convention degenerates into an office seekers' device.

They were dropped, and a different mode of concentrating public opinion was adopted — that of party nominations by conventions of delegates from the States. This worked well at first, the will of the people being strictly obeyed by the delegates, and the majority making the nomination. But it quickly degenerated, and became obnoxious to all the objections to Congress caucus nominations, and many others besides. Members of Congress still attended them, either as delegates or as lobby managers. Persons attended as delegates who had no constituency. Delegates attended upon equivocal appointments. Double sets of delegates sometimes came from the State, and either were admitted or repulsed, as suited the views of the majority. Proxies were invented. Many delegates attended with the sole view of establishing a claim for office, and voted accordingly. The two-thirds rule was invented, to enable the minority to control the majority; and the whole proceeding became anomalous and irresponsible, and subversive of the will of the people, leaving them no more control over the nomination than the subjects of kings have over the birth of the child which is born to rule over them. King Caucus is as potent as any other king in this respect; for whoever gets the nomination — no matter how effected — becomes the candidate of the party, from the necessity of union against the opposite party, and from the indisposition of the great States to go into the House of Representatives to be balanced by the small ones.

The selection of the President as gone to n irresponsible ssembly.

This is the mode of making Presidents, practised by both parties now. It is the virtual election! and thus the election of the President and Vice-President of the United States has passed — not only from the college of electors to which the constitution confided it, and from the people to whom the practice under the constitution gave it, and from the House of Representatives which the constitution provided as ultimate arbiter — but has gone to an anomalous irresponsible body, unknown to law or constitution, unknown to the early ages of our government, and of which a large proportion of the members composing it, and a much larger proportion of interlopers attending it, have no other view either in attending or in promoting the nomination of any particular man, than to get one elected who will enable them to eat out of the public crib — who will give them a key to the public crib.

enton's medy for e evils of nvention ethods.

The evil is destructive to the rights and sovereignty of the people, and to the purity of elections. The remedy is in the application of the democratic principle — the people to vote direct for President and Vice-President; and a second election to be held immediately between the two highest, if no one has a majority of the whole number on the first trial. But this would require an amendment of the constitution, not to be effected but by a concurrence of two-thirds of each house of Congress, and the sanction of three-fourths of the States — a consummation to which the strength of the people has not yet been equal, but of which there is no reason to despair. The great parliamentary reform in Great Britain was only carried after forty years of continued, annual, persevering exertion. Our constitutional reform, in this point of the presidential election, may require but a few years; in the meanwhile I am for the people to *select*, as well as *elect*, their candidates, and for a reference to the House to choose one out of three presented by the people, instead of a caucus nomination of whom it pleased. The House of Representatives is no longer the small and dangerous electoral college that it once was. Instead of thirteen States we now have thirty-one; instead of sixty-five representatives, we have now about two hundred. Responsibility in the House is now

well-established and political ruin, and personal humiliation, attend the violation of the will of the State. No man could be elected now, or endeavor to be elected (after the experience of 1800 and 1824) who is not at the head of the list, and a choice of the majority of the Union. The lesson of those times would deter imitation and the democratic principle would again crush all that were instrumental in thwarting the public will. There is no longer the former danger from the House of Representatives, nor anything in it to justify a previous resort to such assemblages as our national conventions have got to be. The House is legal and responsible, which the convention is not, with a better chance for integrity, as having been actually elected by the people; and more restrained by position, by public opinion, and a clause in the constitution, from the acceptance of office from the man they elect. . . .

51. *Lincoln's Defense of the Convention as a State Party Institution*

The state convention, which began to supersede the legislative caucus during the Jackson contests, especially in the East, was for a time regarded with dislike by many political leaders in the South and West, but at last they were brought to employ it for reasons that are nowhere more cogently set forth than in a paper drafted by Lincoln in 1843 in defense of the adoption of the system by the Whigs of Illinois.

The convention must be adopted in self-defense.

The sixth resolution recommends the adoption of the convention system for the nomination of candidates. This we believe to be of the very first importance. Whether the system is right in itself we do not stop to inquire; contenting ourselves with trying to show that while our opponents use it, it is madness in us not to defend ourselves with it. Experience has shown that we cannot successfully defend ourselves without it. For example, look at the elections of last year. Our candidate for governor, with the approbation of a large portion of the party, took the field without a nomination, and in open opposition to the system. Wherever in the counties the Whigs had held conventions and nominated

candidates for the legislature, the aspirants who were not nominated were induced to rebel against the nominations, and to become candidates, as is said, "on their own hook." And, go where you would into a large Whig county, you were sure to find the Whigs not contending shoulder to shoulder against the common enemy, but divided into factions, and fighting furiously with one another. The election came, and what was the result? The governor beaten — the Whig vote being decreased many thousands since 1840, although the Democratic vote had not increased any. Beaten almost everywhere for members of the legislature, — Tazewell with her four hundred Whig majority, sending a delegation half Democratic; Vermillion with her five hundred, doing the same; Coles, with her four hundred, sending two out of three; and Morgan, with her two hundred and fifty, sending three out of four, — and, this to say nothing of the numerous less glaring examples; the whole winding up with the aggregate number of twenty-seven Democratic representatives sent from Whig counties. As to the senators, too, the result was of the same character. And it is most worthy to be remembered that of all the Whigs in the State who ran against the regular nominees, a single one only was elected. Although they succeeded in defeating the nominees almost by scores, they too were defeated, and the spoils chuckingly borne off by the common enemy.

A house divided against itself cannot stand.

We do not mention the fact of many of the Whigs opposing the convention system heretofore for the purpose of censuring them. Far from it. We expressly protest against such a conclusion. We know they were generally, perhaps universally, as good and true Whigs as we ourselves claim to be. We mention it merely to draw attention to the disastrous result it produced, as an example forever hereafter to be avoided. That "union is strength" is a truth that has been shown, illustrated, and declared in various ways and forms in all the ages of the world. That great fabulist and philosopher, Æsop, illustrated it by his fable of the bundle of sticks; and he whose wisdom surpasses that of all philosophers has declared that "a house divided against itself cannot stand."

It is to induce our friends to act upon this important and universally acknowledged truth that we urge the adoption of the convention system. Reflection will prove that there is no other way of practically applying it. In its application we know there will be incidents temporarily painful; but, after all, those incidents will be fewer and less intense than without the system. If two friends aspire to the same office it is certain that both cannot succeed. Would it not, then, be much less painful to have the question decided by mutual friends some time before, than to snarl and quarrel until the day of election, and then both be beaten by the common enemy?

Before leaving this subject, we think proper to remark that we do not understand the resolution as intended to recommend the application of the convention system to the nomination of candidates for the small offices no way connected with politics; though we must say we do not perceive that such an application of it would be wrong.

52. *The Municipal Boss*

How the boss has evolved.

The maintenance of party organization and the conduct of vigorous campaigns necessitate leadership, and leadership implies concentration of power and discipline in the ranks. In every great municipality, where there are numerous offices to fill and important franchises and privileges to be granted, the struggle for the possession and retention of political power is intense, and out of the conflict has evolved the city boss, the plenitude of whose power is thus described by Mr. Bourke Cockran in a speech delivered in New York City in 1898 in defense of an independent judiciary: —

Executive and legislative power concentrated in the boss.

Now much has been said about bosses and bossism. But it must be remembered that we are not assembled here to contest the existence of a boss-ship, but rather to prevent the extension of its powers over the judiciary. All the powers of this municipality, executive and legislative, are centred in the hands of the individual who rules the destinies of the local Democracy, in the hands of the boss, and there it will remain whatever may be

the outcome of this canvass. But the reserved rights of the citizen — his right to life, liberty, and the pursuit of happiness — are still his property and will remain his property just so long as there are independent judges to defend them, and no longer. It is, therefore, said that the elementary rights of citizenship, the right of the citizen to enjoy his individual privileges by virtue of the constitution under which he lives, or the necessity of his seeking them from the favor of the boss, exercised and dispensed through his dependents on the bench, all depend on the outcome of this election.

The nominal and the real government.

What is this government of ours? Where can we find a parallel to it? Nowhere in the history of other nations or other races. A nominal government is installed in the City Hall; the actual government is administered in the Democratic club. Officers are sworn and appointed to discharge certain functions and to a certain extent they do discharge them; but outside of the mere routine duties of their departments every exercise of discretionary power is controlled and prescribed by the private individual who is not under the necessity of even recording his decrees or acknowledging them.

The sources of the boss's power.

Ten thousand men are in the employment of the City Government, whose appointments, in contemplation of the law, are supposed to spring from various departments, and they themselves are supposed to be responsible for these departments, but each one holds his office through the favor, or at least the forbearance of the boss, whose decrees, though unregistered, are more powerful than the law, yet whose existence is not recognised by the law, whose nod can make a fortune or unmake a career. Every financial interest in this great city courts his favor and dreads his hostility. If to-day he was to declare he needed a million dollars for political purposes, before next Friday two million dollars would be furnished. If anybody refused to give him the position to which he thought he was entitled, that person might find an engine house erected in his back yard. It is only necessary for an individual to fall under his displeasure to have 10,000 sets of wits planning to

attract the favor of the boss by annoying the object of his resentment.

The self-restraint of the boss.

It is only fair and simple justice that, I should say, considering his opportunities, considering his power, that our boss may well declare with Lord Clive, "Considering my opportunities, I am amazed at my own moderation." Conceive for a moment his position, and then tell me if he be not rather entitled to praise for forbearance than blame for excess. I do not believe in boss government, but I believe that under existing conditions it is inevitable. I do not believe that the boss has created the boss-ship which he administers. He is not the source of it; he is the product of it. Why, the first speech I ever delivered in Tammany Hall, I delivered against the measure which I then foresaw would result in the creation of despotic powers in this community, to which I now attribute the existence of the boss-ship as it flourishes and dominates us, and nobody applauded me more heartily than the individual who now is the boss of Tammany Hall. I do not want any particular change in bosses. All bosses look alike to me. [Prolonged laughter and applause.]

The hope i in the court

Each one of us has rights, privileges, immunities, which are ours, secure from the interference of any boss, even though he control the executive and legislative departments of the city and state, so long as the judges are virtuous, free, and independent. But let the power of the boss be extended over the judiciary, let the judges be taught that their prospects of re-nomination, and of promotion depend not upon loyalty to the people, but upon obedience to the boss and our rights and our privileges are no longer ours to be enjoyed while we obey the laws of our country, but they become the favor that we may enjoy from the forbearance or favor of a boss.

53. *The Parts of a State Political Machine*

Before the first half of the nineteenth century had elapsed, that necessity for party unity against the common enemy, which Lincoln had pointed out to his colleagues in Illinois, led to an organi-

zation of a system of committees and conventions for every political subdivision in the Union in which officers were to be elected. It has often happened that this magnificent organization has fallen into the hands of office seekers, professional politicians, and private persons seeking gain at public expense. The following statement from the pen of an experienced political worker, Mr. Wanamaker, indicates the manner in which a powerful party machine may be constructed by an astute leader: —

Part A. — A Republican State Committee, which in every part is subjugated to serve the personal interests of Senator Quay first and the party next, without respect to the will of the people.

Part B. — Great prestige and patronage, controlled by Quay as a United States Senator, with two votes, his own and the other.

Part C. — Thirty Congressmen, with their secretaries, sixty persons, whose salaries aggregate $180,000 annually, and who are responsible to the machine for their respective districts.

Part D. — The 419 officers and employees of the State government, who receive in salaries $1,034,500 annually, and who are selected only because they are supposed to be able to deliver the votes of their districts to any one the Quay machine dictates. These men are all assessed by the bosses.

Part E. — The State Senate, with every officer, from president *pro tem* down to page-boys, selected to do the machine's bidding. The expenses of the Senate last year were $169,604.

Part F. — The State House of Representatives, with members, officers and employees, 257 in number, who drew $468,302 last year. All committees are selected by the machine, and are chairmened by men who know no will but that of Senator Quay. Thus his machine absolutely controls all revenue and tax legislation.

Part G. — 8122 post-offices, with salaries amounting to $3,705,446. Most postmasters are made the personal agents of the machine in their respective towns.

Part H. — 4149 county offices, a majority of whom are controlled by Senator Quay's machine, whose salaries amount to $5,000,000.

Part I. — The Philadelphia Mint, with 438 employees, who receive in yearly salaries $326,565.

Part J. — The offices of Collector of Port, with 400 employees, who receive in salaries $454,000.

Part K. — The internal revenue offices, with 281 employees, who receive in salaries $356,400.

Part L. — The United States Circuit and District Courts, with forty-one employees, who receive in salaries $95,000.

Part M. — League Island Navy Yard and Senate arsenals, with 585 employees, who receive in salaries $725,000, making a total of 14,705 officers and employees, who receive from the State and and National Governments $7,609,911 annually.

Part N. — The thousands of trustees, other officials and employees of hospitals, State and private; State prisons, reformatories, State asylums, charitable homes, State colleges, normal schools, soldiers' orphans' schools, scientific institutes and museums who are expected to support the machine, or the appropriations of their institutions will be endangered.

Part O. — The combined capital of the brewers of the State, their thousands of employees and dependent patrons whom they control. It is alleged to have been the money of the brewers that paid the large sums during Superintendent of Mint Boyer's administration as State Treasurer necessary to make good shortages which saved the machine when his cashier, Mr. Livesey, became a fugitive from justice.

Part P. — Besides the amounts paid for salaries of State officers which have already been accounted for, the Appropriation Committee, who are of Quay's personal selection, disburse $10,000,000 annually to schools, hospitals, penal institutions, etc. The bold manipulation of these funds for the benefit of the machine has educated people to regard moneys received for these purposes as personal contributions from Senator Quay, in return for which they must render help to his machine.

Part Q. — The State Liquor League, whose members are in every city, town, hamlet, and crossroads throughout the State,

and who maintain a permanent State organization, having headquarters and representatives at Harrisburg during the sessions of the Legislature, are always for Senator Quay's machine, and form an important part of the machine's operations.

Part R. — A large number of the Common Pleas Judges throughout the State, who use their license-granting power for the benefit of the machine by rewarding those faithful to the cause of Quay, and punishing those opposed to the machine.

Part S. — The millions of withheld school and personal tax moneys that are used to further the interests of the machine. At three per cent interest, the rate that Smedley Darlington testified last week, under oath, his trust company paid, the machine has taken $2,500,000 of your money since Senator Quay began his reign.

Part T. — The hundreds of subservient newspapers who are recipients of machine favors, with their army of newsgatherers and correspondents, who are forced to chloroform public sentiment, and hide the iniquities of the machine.

The principal allies and partners of the machine are the corporations. The 15,000 national and State office-holders, and the thousands of other officials connected with State institutions, form a small part of the whole number of obedient machine men who are constantly at the command of Senator Quay, the admitted boss of the machine. The corporation employees of the State who are controlled for Quay's use increase the number to the proportions of a vast army.

The steam railroads of the State employ 85,117 men, and pay them annually in wages $49,400,000. Of this number, the Pennsylvania and Reading Railroads furnish 37,911 and 16,083 men, respectively. The Vanderbilt system furnishes 12,432 men; the Baltimore and Ohio, 3615; the New Jersey Central, 2864; the Lehigh Valley, 12,062; and the Delaware, Lackawanna, and Western, 2150. The great street railways of the State, which have received valuable legislative concessions for nothing, give the machine loyal support with 12,079 employees who are paid in salaries $6,920,692 every year.

That monopoly of monopolies, the Standard Oil Company, pays annually $2,500,000 to its 3000 employees, who are taught fidelity to Senator Quay's machine. The Bethlehem Iron Works, whose armor plates are sold to the Government for nearly double the contract price offered to foreign countries, influence their employees to such an extent that in the city of Bethlehem it has been found difficult to get men to stand as anti-Quay delegates.

The thousands of working-men of the Carnegie Iron Works, it is said, are marched to the polls under the supervision of superintendents and foremen, and voted for Quay candidates under penalty of losing their jobs.

The great express companies who furnish franks to machine followers, one of whom is bossed by Senator Platt, with their thousands of men, can be counted on for great service to the machine.

The telegraph companies, whose State officials can, it is said, be found at the inner Quay councils, with the thousands of employees distributed at every important point throughout the State and before whom a large share of the important news must pass, are one of the most dangerous parts of the Quay machine.

54. *The Political Party Included in the Legal Framework of Government*

Political parties grew up as purely voluntary groups seeking to secure possession of the offices of government; and in spite of the many abuses which early crept in, it was steadily maintained that the government had no business to interfere with the organization and management of such purely private associations. It was found by experience, however, that, if the people were to retain control of the government, they must establish a regular legal control of parties. Thus the party has practically ceased to be an "extra-legal" institution. In the preamble to the recent Oregon law regulating primaries, the operations of parties are declared to have a significance almost equal to that of the state government itself.[1]

[1] See below for primary legislation, p. 586.

'arty overnment ıdorsed.

Under our form of government, political parties are useful and necessary at the present time. It is necessary for the public welfare and safety that every practical guaranty shall be provided by law to assure the people generally, as well as the members of the several parties, that political parties shall be fairly, freely, and honestly conducted, in appearance as well as in fact. The method of naming candidates for elective public offices by political parties and voluntary political organizations is the best plan yet found for placing before the people the names of qualified and worthy citizens from whom the electors may choose the officers of our government. The government of our State by its electors and the government of a political party by its members are rightfully based on the same general principles. Every political party and every volunteer political organization has the same right to be protected from the interference of persons who are not identified with it as its known and publicly avowed members, that the government of the State has to protect itself from the interference of persons who are not known and registered as its electors.

'he party nd its awful perations rotected.

It is as great a wrong to the people, as well as to the members of a political party, for one who is not known to be one of its members to vote or take any part at any election or other proceedings of such political party, as it is for one who is not a qualified and registered elector to vote at any State election or take any part in the business of the State. Every political party and voluntary political organization is rightfully entitled to the sole and exclusive use of every word of its official name. The people of the State and the members of every political party and voluntary political organization are rightfully entitled to know that every person who offers to take any part in the affairs or business of any political party or voluntary political organization in the State is in good faith a member of such party. The reason for the law which requires a secret ballot when all the electors choose their officers, equally requires a secret ballot when the members of a party choose their candidates for public office. It is as necessary for the preservation of the public welfare and safety that

there shall be a free and fair vote and an honest count, as well as a secret ballot at primary elections, as it is that there shall be a free and fair vote and an honest count in addition to the secret ballot at all elections of public officers. All qualified electors who wish to serve the people in an elective public office are rightfully entitled to equal opportunities under the law. The purpose of this law is better to secure and to preserve the rights of political parties and voluntary political organizations, and their members and candidates, and especially of the rights above stated.

PART II

THE FEDERAL GOVERNMENT

CHAPTER VIII

THE GENERAL PRINCIPLES OF THE FEDERAL SYSTEM OF GOVERNMENT

55. Original Limitations on the Power of the Federal Government

IT is a cardinal doctrine of our political system that the powers of the federal government are limited to those explicitly granted in the Constitution itself, although it must be admitted that in practice a rather generous interpretation has been placed at times on several of the clauses. The framers of the Constitution, however, not content with the general understanding as to the limited nature of the federal powers, inserted in the body of the original document a number of provisions definitely forbidding the federal government to do certain things and regulating its exercise of the powers granted.

Powers denied to the United States.

The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.[1]

The privilege of the writ of *habeas corpus* shall not be suspended unless when, in case of rebellion or invasion, the public safety may require it.

No bill of attainder, or *ex post facto* law, shall be passed.

No capitation or other direct tax shall be laid, unless in pro-

[1] This clause was inserted for the temporary protection of the slave trade.

portion to the census or enumeration hereinbefore directed to be taken.

No tax or duty shall be laid on articles exported from any State.

No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state.

Definition of treason.

Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

56. *Limitations Imposed on the Federal Government by the Amendments*

Notwithstanding the express nature of the powers granted to the federal government and the precise limitations laid down in the original instrument, it was feared by the more democratic leaders like Jefferson that in the exercise of its recognized powers the central authorities might trench upon the fundamental principles of individual liberty, deemed essential to the existence of all free governments. Accordingly, ten amendments especially protecting private rights against federal intervention were adopted in 1791, and to these an eleventh amendment was added in 1798.

Article I

Amendments to the Constitution.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Article II

A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

Article III

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Article IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article V

Indictment and trial by jury.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in active service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Article VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

Article VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

Article VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Article IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Article X

The powers not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

Article XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

57. *The Theory of the Separation of Powers in the Federal Constitution* *

The practical application of the theory.

The doctrine that the three departments of government — legislative, executive, and judicial — should be kept separate is not a mere theory of American politics; it is a rule of law which the Courts will apply by declaring void the actions of one department which trench on the clearly determined sphere of another. In 1876 the House of Representatives attempted to punish a Mr. Kilbourn for refusing to answer certain questions put by a House Committee conducting an investigation into the business of a private concern in which the United States had an interest, and the Supreme Court released Kilbourn on the ground that the inquiry was judicial and not legislative in character. The following statement of the theory is taken from the decision of the Court in this case: —

The separation of powers one of the merits of American government.

It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether state or national, are divided into the three grand departments, the executive, the legislative and the judicial; that the functions appropriate to each of these branches of government shall be vested in a separate body of public servants; and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the power confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.

Exceptions to the rule.

To these general propositions there are in the Constitution of the United States some important exceptions. One of these is, that the President is so far made a part of the legislative power, that his assent is required to the enactment of all statutes and resolutions of Congress. This, however, is so only to a limited extent, for a bill may become a law notwithstanding the refusal

of the President to approve it, by a vote of two-thirds of each House of Congress. So, also, the Senate is made a partaker in the functions of appointing officers and making treaties, which are supposed to be properly executive, by requiring its consent to the appointment of such officers and the ratification of treaties. The Senate also exercises the judicial power of trying impeachments, and the House of preferring articles of impeachment.

In the main, however, that instrument, the model on which are constructed the fundamental laws of the States, has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative and the judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of these departments cannot be exercised by another.

The House of Representatives exceeded its authority.

In looking to the preamble and resolution under which the committee acted, before which Kilbourn refused to testify, we are of opinion that the House of Representatives not only exceeded the limit of its own authority, but assumed a power which could only properly be exercised by another branch of the government, because it was in its nature clearly judicial.

The action in question was judicial

The Constitution declares that the judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as the Congress shall from time to time ordain and establish. If what we have said of the division of the powers of the government among the three departments be sound, this is equivalent to a declaration that no judicial power is vested in the Congress or either branch of it, save in the cases specifically enumerated to which we have referred. If the investigation which the committee was directed to make was judicial in its character, and could only be properly and successfully made by a court of justice, and if it related to a matter wherein relief or redress could be had only by a judicial proceeding, we do not, after what has been said, deem it necessary to discuss the proposition that the power attempted to be exercised was one confided by

the Constitution to the judicial and not to the legislative department of the government. We think it equally clear that the power asserted is judicial and not legislative.

Imprisonment of Kilbourn therefore unlawful.

We are of the opinion, for these reasons, that the resolution of the House of Representatives authorizing the investigation was in excess of the power conferred on that body by the Constitution; that the committee, therefore, had no lawful authority to require Kilbourn to testify as a witness beyond what he voluntarily chose to tell; that the orders and resolutions of the House, and the warrant of the speaker, under which Kilbourn was imprisoned, are, in like manner, void for want of jurisdiction in that body, and that his imprisonment was without any lawful authority.

58. *The Supremacy of Federal Law* *

The federal Constitution expressly declares in the following clauses the supremacy of federal law:—

Article VI of the federal Constitution

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The senators and representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

It was thus clearly established that within its sphere, the federal government was supreme, but it was not expressly stated what authority should have the power to decide when any particular act of the government was within its prescribed limits of power. The supremacy of the federal law as interpreted by the Supreme Court in the last instance was forcibly asserted by Chief Justice

Taney in a long opinion delivered in connection with a fugitive slave case, from which only a few passages can be given here.

The necessity for a common arbiter.

The Constitution was not formed merely to guard the States against danger from foreign nations, but mainly to secure union and harmony at home; for if this object could be obtained, there would be but little danger from abroad; and to accomplish this purpose, it was felt by the statesmen who framed the Constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the States then possessed should be ceded to the General Government; and that, in the sphere of action assigned to it, it should be supreme and strong enough to execute its own laws by its own tribunals, without interruption from a State or from State authorities. And it was evident that anything short of this would be inadequate to the main objects for which the Government was established; and that local interests, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice by one State upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all, by appropriate laws, to be carried into execution peacefully by its judicial tribunals.

Why judicial supremacy is essential.

The supremacy conferred on this Government could not peacefully be maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution, for if left to the courts of justice in the several States, conflicting decisions would unavoidably take place, and the local tribunals could hardly be expected to be always free from the local influences of which we have spoken. And the Constitution and laws and treaties of the United States, and the powers granted to the Federal Government, would soon receive different interpretations in different States, and the Government of the United States would soon become one thing in one State and

another thing in another. It was essential, therefore, to its very existence as a Government, that it should have the power of establishing courts of justice, altogether independent of State power, to carry into effect its own laws; and that a tribunal should be established in which all cases which might arise under the Constitution and laws and treaties of the United States should be finally and conclusively decided. Without such a tribunal, it is obvious that there would be no uniformity of judicial decision; and that the supremacy (which is but another name for independence), so carefully provided in the clause of the Constitution above referred to,[1] could not possibly be maintained peacefully, unless it was associated with this paramount judicial authority.

ıpreme ourt must ıve appel- te jurisdic- ɔn over ate courts.

Accordingly, it was conferred on the General Government, in clear, precise, and comprehensive terms. It is declared that its judicial power shall (among other subjects enumerated) extend to all cases in law and equity arising under the Constitution and laws of the United States, and that in such cases, as well as the others there enumerated, this court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as Congress shall make. The appellate power, it will be observed, is conferred on this court in all cases or suits in which such a question shall arise. It is not confined to suits in the inferior courts of the United States, but extends to all cases where such a question arises, whether it be in a judicial tribunal of a State or of the United States. And it is manifest that this ultimate appellate power in a tribunal created by the Constitution itself was deemed essential to secure the independence and supremacy of the General Government in the sphere of action assigned to it; to make the Constitution and laws of the United States uniform, and the same in every State; and to guard against evils which would inevitably arise from conflicting opinions between the courts of a State and of the United States, if there was no common arbiter authorized to decide between them.

[1] P. 140.

States are bound to submit to the decisi of the Su- preme Co

The importance which the framers of the Constitution attached to such a tribunal, for the purpose of preserving internal tranquillity, is strikingly manifested by the clause which gives this court jurisdiction over the sovereign States which compose this Union, when a controversy arises between them. Instead of reserving the right to seek redress for injustice from another State by their sovereign powers, they have bound themselves to submit to the decision of this court, and to abide by its judgment. And it is not out of place to say, here, that experience has demonstrated that this power was not unwisely surrendered by the States; for in the time that has already elapsed since this Government came into existence, several irritating and angry controversies have taken place between adjoining States, in relation to their respective boundaries, and which have sometimes threatened to end in force and violence, but for the power vested in this court to hear them and decide between them.

Judicial decisions take the place of v

As the final appellate power in all such questions is given to this court, controversies as to the respective powers of the United States and the States, instead of being determined by military and physical force, are heard, investigated, and finally settled, with the calmness and deliberation of judicial inquiry. And no one can fail to see, that if such an arbiter had not been provided, in our complicated system of government, internal tranquillity could not have been preserved; and if such controversies were left to the arbitrament of physical force, our Governments, State and National, would soon cease to be Governments of laws, and revolutions by force of arms would take the place of courts of justice and judicial decisions.

59. *The Suffrage under the Federal Constitution*

The negat character of federal suffrage provisions

The federal Constitution does not state who shall have the right to vote in the United States. The problem was discussed in the convention, but the original instrument left the matter to the states. Representatives in Congress were to be chosen by the persons entitled under state law to vote for members of the most numer-

ous branch of the state legislature; senators were to be elected by the legislatures; and presidential electors were to be chosen as the legislatures of the state should determine. The later amendments designed to secure the vote for negroes were merely negative statements restricting the right of the state to regulate the suffrage. Subject to the limits of the Fourteenth and Fifteenth Amendments,[1] the states may fix their own suffrage qualifications and, as a result, there is a great variety of practices, some of the states going so far as to enfranchise persons not yet full citizens of the United States. This anomalous situation was discussed by Mr. Lincoln in the New York state convention of 1894.

ns added to suffrage.

We have had placed in our hands, at the expense of the State, the Constitutions of all the States in the Union. In examining these Constitutions, with a view, possibly, of borrowing some ideas therefrom, which we might find useful, I find that in sixteen of these States [1894], named in the resolutions, persons are permitted to vote before they become citizens of the United States.

zen rage uld be national

Now, the State of New York has steadily adhered to the principle of citizen suffrage. We do not believe in permitting people to become voters and to participate in the affairs of government until they are at least citizens. In getting at the matter, to see what could be done, so far as this Convention is concerned, it seemed to me that we might very properly call the attention of Congress to this matter by resolution of this Convention; not in the sense of discourteous criticism of the Constitutions of other States, as is suggested in the report of the Suffrage Committee; that was not intended by these resolutions at all; but that we might ask Congress to take some action, with a view to implanting the principle of citizen suffrage in the Constitution of the United States. That instrument does not now regulate this question. It is left to the States themselves, and, I believe, the time has come in our history when the Constitution of the United States ought to define the rules of suffrage, or at least that it should go to the extent of limiting the right of suffrage to people

[1] See below, p. 393.

who are citizens. It seems to me that we ought not to have one standard for citizenship and another standard for suffrage; but that in all the States, and especially in the event of a national election, there should be one standard for all voters throughout the entire Union. These voters in these States vote for representatives in Congress, for presidential electors, and they, also, vote for members of the Legislature who elect Senators of the United States, thereby making the qualifications of voters unequal in the different States; and, therefore, it may work to the disadvantage of States holding to citizen suffrage.

How the present system works.

To illustrate: Four of these States permit voting after a residence of only six months; so that if a foreigner goes to one of those States the first of May, and declares his intention of becoming a citizen, he may at the following November election vote for any officer, State or national. Thus, after a residence of only six months in this country, he becomes entitled to vote, with the same force and effect, and his vote counts for just as much as the vote of a citizen who has resided here five years, or who has been raised in this country and has been compelled to live here twenty-one years. Again, suppose that two brothers come here by the same steamer; one of them goes to one of these States, and the other remains in this State. The one who goes to these States may vote after living there six months, but the one who remains in New York State must live here five years before he is entitled to vote.

A constitutional amendme the reme

It is this inequality that is aimed at by these resolutions, and there seems to be no way of remedying this state of affairs except by amending the Constitution of the United States. The Constitution itself, at the time it was framed, was the creature of compromises. The question of suffrage was left largely to the States themselves. The electors who are entitled to vote for the most numerous branch of the State legislature may vote for representatives in Congress. That, I think, is the only provision in the Constitution on the subject. It seems to me that it is peculiarly proper to take some action upon this matter not in

the spirit of criticism, but by way of courteous depreciation or protest. We are here representing ten per cent of the population of the entire Union. We are here representing fifteen per cent of the wealth of the entire Union; and when we find that our sister States have placed in their Constitutions provisions which we believe to be inimical to our interests and the interests of the entire country at large, I think it is proper for us to, at least, call their attention to it, and by going to the source of amendments to the Constitution of the United States, ask that the Constitution itself be so amended as to correct this inequality in the right of suffrage. We have a right to be heard. It is our duty to speak, and we would be remiss if we failed to do so.

60. *Reciprocal Guarantee of Privileges and Immunities among the Several States*

One of the fundamental purposes of the federal Constitution was to make a nation in which citizens might move freely about without hindrances from the respective states. To secure this end, its framers embodied in it a clause to the effect that "The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States." This clause has been interpreted by the courts in this fashion: —

> What are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature *fundamental;* which belong to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What those fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such re-

straints as the government may justly prescribe for the general good of the whole. The right of a citizen of one State to pass through or reside in any other State, for the purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of *habeas corpus;* to institute and maintain actions of every kind in the courts of the State; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by citizens of the other State, — may be mentioned as some of the particular privileges and immunities of citizens which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added the elective franchise as regulated and established by the laws or constitution of the State in which it is to be exercised. These, and many others which might be mentioned are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each State in every other State was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old Articles of Confederation) "the better to secure and perpetuate mutual friendship and intercourse among the people of the different States of the Union."

A state cannot discriminate against citizens of other state

It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property, and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. (Lemmon *v.* People, 20 N. Y. 607.) Indeed, without

some provision of the kind, removing from the citizens of each State the disabilities of alienage in other States, and giving them equality of privilege with the citizens of those States, the republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.

A citizen cannot carry special privileges into another state.

But the privileges and immunities secured to citizens of each State in the several States by the provision in question, are those privileges and immunities which are common to the citizens in the latter States, under their constitution and laws, by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other States. They can have no such operation, except by the permission, express or implied, of those States. The special privileges which they confer must, therefore, be enjoyed at home unless the assent of other States to their enjoyment therein be given.

61. *Interstate Rendition*

The constitutional provision.

In order that criminals from one state may not be harbored in another state, the Constitution provides that "A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall on demand of the executive authority of the state from which he fled be delivered up to be removed to the state having jurisdiction of the crime." The Supreme Court, however, has decided that there is no way of compelling a state governor to surrender a criminal, should he refuse to do so on demand, and, in actual practice, governors have a wide discretion in the matter. The following report from an attorney-general of Iowa illustrates how the requisitions of other states are looked into and on sufficient grounds may be disallowed: —

The governor of Iowa asks for advice on a requisition from Kentucky.

SIR — I beg to acknowledge the receipt of your communication of the 12th inst., containing a request that I examine the requisition made by the governor of Kentucky for the extradition of J. D. Wurtsbaugh, together with the evidence attached to the requisition, and advise you as governor of the state whether in

my opinion such requisition should be honored and Wurtsbaugh returned to the state of Kentucky for trial for the offense claimed to have been committed in that state. In response to such request I beg to submit the following opinion:

The crime committed eighteen years ago.

The facts in the case, as disclosed by the undisputed evidence, are these: [Here follows statement of facts]. . . . It is repugnant to every sense of justice to say that where a person leaves a state in the ordinary course of his affairs without any attempt of concealment, and for eighteen years lives an upright life, he may then be arrested and returned to the state where the crime is claimed to have been committed eighteen years before, to be put on trial for that offense, unless he is charged with murder or treason.

Why the request from Kentucky should be denied.

This view, as it appears to me, is based upon the soundest principles of public policy; that is, if the authorities of a sister state desire the arrest and return of a fugitive from justice, the application therefore must be made within a reasonable time under all the circumstances of the case after the commission of the offense. The request now made by the governor of Kentucky for the arrest and return of J. D. Wurtsbaugh for an offense committed more than eighteen years ago in that state does not fall within this rule. If the authorities of Kentucky desired to try Mr. Wurtsbaugh for the offense of bigamy, an application for his return to that state should have been made with reasonable promptness after the offense was committed. Under all the circumstances of this case, I am of the opinion that Wurtsbaugh can not now be held to be a fugitive from justice under the provisions of the federal constitution. . . .

The request of the governor of Kentucky should not, therefore in my opinion, be complied with, and Wurtsbaugh should not be arrested and returned to that state to answer the charge preferred against him. Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

October 26, 1903.

To the Honorable A. B. Cummins,
Governor of Iowa.

62. *The National Character of Citizenship* *

States cannot grant citizenship.

Although in common usage we speak of a person's being a citizen of a particular state, there is in actual fact no such thing as state citizenship in the strict sense in which the term is used in international law. Citizenship is national in character, and states cannot interfere with the methods by which it is acquired or lost. The original Constitution, however, was not explicit in its terms as to citizenship, nor is the Fourteenth Amendment referring to it exhaustive in its provisions. The subject, confused as it is, has received the following general treatment by the Supreme Court: —

The term 'citizenship" as used in the Federal Constitution.

The Constitution of the United States, as originally adopted, uses the words "citizen of the United States," and "natural-born citizen of the United States." By the original Constitution, every representative in Congress is required to have been "seven years a citizen of the United States," and every Senator to have been "nine years a citizen of the United States"; and "no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President." The Fourteenth Article of Amendment, besides declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," also declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." And the Fifteenth Article of Amendment declares that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude." The Constitution nowhere defines the meaning of these words, either by way of inclusion or exclusion, except in so far as this is done by the affirmative declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States." In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution.

Three classes o persons admitted citizensh

By the Constitution of the United States, Congress was empowered "to establish an uniform rule of naturalization." In the exercise of this power, Congress, by successive acts, has made provision for the admission to citizenship of three principal classes of persons: *First.* Aliens, having resided for a certain time "within the limits and under the jurisdiction of the United States," and naturalized individually by proceedings in a court of record. *Second.* Children of persons so naturalized, "dwelling within the United States, and being under the age of twenty-one years at the time of such naturalization." *Third.* Foreign-born children of American citizens, coming within the definitions prescribed by Congress.

Persons subject t the juris tion of t United States.

The real object of the Fourteenth Amendment of the Constitution, in qualifying the words, "All persons born in the United States," by the addition, "and subject to the jurisdiction thereof," would appear to have been to exclude, by the fewest and fittest words, (besides children of the members of the Indian tribes, standing in a peculiar relation to the National Government, unknown to the common law,) two classes of cases — children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State — both of which, as has already been shown, by the law of England and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country.

Who are natural-b citizens.

The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country; including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or

of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The Amendment, in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. To hold that the Fourteenth Amendment of the Constitution excludes from citizenship the children, born in the United States, of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German or other European parentage, who have always been considered and treated as citizens of the United States.

Two sources of citizenship.

The Fourteenth Amendment of the Constitution, in the declaration that "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," contemplates two sources of citizenship and two only: birth and naturalization. Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution. Every person born within the United States and subject to the jurisdiction thereof becomes at once a citizen of the United States and needs no naturalization. A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory; or by authority of congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals as in the ordinary provisions of the naturalization acts.

Naturalized citizens given full rights.

The power of naturalization, vested in Congress by the constitution, is a power to confer citizenship, not a power to take it away. "A naturalized citizen," said Chief Justice Marshall, "becomes a member of the society possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native.[1] The constitution does not authorize congress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it so far as respects the individual."

[1] It will be noted, however, that a naturalized citizen cannot be President or Vice President.

CHAPTER IX

THE NOMINATION AND ELECTION OF THE PRESIDENT

63. *Constitutional Provisions Relating to the Election of the President*

THE mode of selecting the chief magistrate of the United States, Hamilton stated in *The Federalist*, was almost the only part of the new scheme of government which escaped without severe censure or received the slightest mark of approbation from its opponents. Nevertheless, it has been the only part of the national machinery which has been amended, and, in its actual operation, it has departed completely from the ideas of its designers. The following constitutional provisions, however, form the starting point for the study of the subject:—

cle II he ral Con- ıtion.

1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected as follows:

2. Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

elfth endment.

[1. The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and

of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate; the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately by ballot the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of death or other constitutional disability of the President.

2. The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice.

3. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.][1]

[1] These three paragraphs constitute the Twelfth Amendment, which supplanted the following clause of the original Constitution in 1804: "3. The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which

4. The Congress may determine the time of choosing the electors, and the day on which they shall give their votes, which day shall be the same throughout the United States.

ualifica-
ons.

5. No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years and been fourteen years a resident within the United States.

iccession.

6. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President; and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President; and such officer shall act accordingly, until the disability be removed or a President shall be elected.

ompensa-
on.

7. The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

list they shall sign and certify, and transmit, sealed, to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then, from the five highest on the list, the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President."

8. Before he enter on the execution of his office, he shall take the following oath or affirmation: Oath.

"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States."

The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors. Impeachment.

64. *The Choice of the Presidential Electors*

Under the terms of the Constitution, the electors of each state are to be chosen as the legislature thereof may determine. There was, however, very early a uniform tendency in the direction of popular choice on a general state ticket, and, when Michigan departed temporarily from that method in 1892, President Harrison in a message to Congress made this statement of the case against district elections: —

The method of appointment by the States of electors of President and Vice-President has recently attracted renewed interest by reason of a departure by the State of Michigan from the method which had become uniform in all the States. Prior to 1832 various methods had been used by the different States, and even by the same State. In some the choice was made by the legislature; in others electors were chosen by districts, but more generally by the voters of the whole State upon a general ticket. The movement toward the adoption of the last-named method had an early beginning and went steadily forward among the States until in 1832 there remained but a single State (South Carolina) that had not adopted it.[1] That State until the Civil War continued to choose its electors by a vote of the legislature, but after the war changed its method and conformed to the practice of other States. The history of the electoral system.

[1] Election by general ticket went into effect in Maryland in 1836.

For nearly sixty years all the States save one have appointed their electors by a popular vote upon a general ticket, and for nearly thirty years this method was universal.

he neral ket proved by perience.

After a full test of other methods, without important division or dissent in any State and without any purpose of party advantage, as we must believe, but solely upon the consideration that uniformity was desirable and that a general election in territorial divisions not subject to change was most consistent with the popular character of our institutions, best preserved the equality of the voters, and perfectly removed the choice of President from the baneful influence of the "gerrymander," the practice of all the States was brought into harmony. That this concurrence should now be broken is, I think, an unfortunate and even a threatening episode, and one that may well suggest whether the States that still give their approval to the old and prevailing method ought not to secure by a constitutional amendment a practice which has had the approval of all. . . .

he evils of e gerry- ander tended presiden- il elections.

Gerrymanders for Congressional purposes are in most cases buttressed by a gerrymander of the legislative districts, thus making it impossible for a majority of the legal voters of the State to correct the apportionment and equalize the Congressional districts. A minority rule is established that only a political convulsion can overthrow. I have recently been advised that in one county of a certain State three districts for the election of members of the legislature are constituted as follows: One has 65,000 population, one 15,000, and one 10,000, while in another county detached, non-contiguous sections have been united to make a legislative district. These methods have already found effective application to the choice of Senators and Representatives in Congress, and now an evil start has been made in the direction of applying them to the choice by the States of electors of President and Vice-President. If this is accomplished, we shall then have the three great departments of the Government in the grasp of the "gerrymander," the legislative and executive directly and the judiciary indirectly through the power of appointment.

The pow of the legislatur not unre stricted i this matt

An election implies a body of electors having prescribed qualifications, each one of whom has an equal value and influence in determining the result. So when the Constitution provides that "each State shall appoint" (elect), "in such manner as the legislature thereof may direct, a number of electors," etc., an unrestricted power was not given to the legislatures in the selection of the methods to be used. "A republican form of government" is guaranteed by the Constitution to each State, and the power given by the same instrument to the legislatures of the States to prescribe methods for the choice by the State of electors must be exercised under that limitation. The essential features of such a government are the right of the people to choose their own officers and the nearest practicable equality of value in the suffrages given in determining that choice.

The gerr mander i "republi can" in character

It will not be claimed that the power given to the legislature would support a law providing that the persons receiving the smallest vote should be the electors or a law that all the electors should be chosen by the voters of a single Congressional district. The State is to choose, and under the pretense of regulating methods the legislature can neither vest the right of choice elsewhere nor adopt methods not conformable to republican institutions. It is not my purpose here to discuss the question whether a choice by the legislature or by the voters of equal single districts is a choice by the State, but only to recommend such regulation of this matter by constitutional amendment as will secure uniformity and prevent that disgraceful partisan jugglery to which such a liberty of choice, if it exists, offers a temptation.

65. *Counting the Electoral Votes in the States*

Subject to the provision that Congress may fix the day for choosing electors and the day on which they must cast their votes, the Constitution leaves the general regulation of the methods of casting the vote and the compensation of the electors to the respective States. These paragraphs from the Oregon laws illustrate the general custom: —

Election of presidential electors.

On the Tuesday next after the first Monday in November, 1864, and every four years thereafter, there shall be elected by the qualified electors of this State as many electors of president and vice president as this State may be entitled to elect of senators and representatives in Congress.

Duties of electors.

The electors of president and vice president shall convene at the seat of government on the first Wednesday of December next after the election, at the hour of twelve of the clock at noon of that day, and if there shall be any vacancy in the office of an elector, occasioned by death, refusal to act, neglect to attend, or otherwise, the electors present shall immediately proceed to fill by *viva voce* and plurality of votes, such vacancy in the electoral college, and when all electors shall appear, or the vacancies, if any, shall have been filled as above provided, such electors shall proceed to perform the duties required of them by the constitution and laws of the United States.

Canvass of votes.

The votes for the electors shall be given, received, returned, and canvassed as the same are given, returned, and canvassed for members of Congress. The Secretary of State shall prepare two lists of the names of the electors elected, and affix the seal of the State to the same. Such lists shall be signed by the Governor and Secretary, and by the latter delivered to the college of electors at the hour of their meeting on such first Wednesday of December.

Compensation.

Every such elector who shall attend at the time and place appointed, and give his vote for president and vice president, shall be entitled to receive from this State $3 for each day's attendance at such election, and $3 for every twenty miles' travel in going to and returning from the place where the electors shall meet, on the usually traveled route.

66. *The Call for the National Convention*

The rise of great political parties, each putting forward presidential and vice-presidential candidates, has completely overthrown the idea of the Fathers that the chief magistrate should be selected by a small number of specially capable men removed

from the passions and interests of the general mass of the population. The composition of a national nominating convention is fully described by the following call signed by the Chairman and Secretary of the Republican national committee, instructing Republicans to choose delegates for the party assembly: —

To the Republican Electors of the United States:

Date and place of convention.

In accordance with established custom and in obedience to instructions of the Republican National Convention of 1904, the Republican National Committee now directs that a National Convention of delegates representative of the Republican party be held in the city of Chicago, in the State of Illinois, at 12 o'clock noon, on Tuesday, the 16th day of June, 1908, for the purpose of nominating candidates for President and Vice President, to be voted for at the Presidential election, Tuesday, November 3, 1908, and for the transaction of such other business as may properly come before it.

States and territories.

The Republican electors of the several States and Territories, including Hawaii, the District of Columbia, Alaska, Porto Rico and the Philippine Islands, and all other electors, without regard to past political affiliation, who believe in the principles of the Republican party and indorse its policies, are cordially invited to unite under this call in the selection of delegates to said convention.

Composition.

Said National Convention shall consist of four delegates-at-large from each State, two delegates for each Representative at large in the Congress, two delegates from each Congressional district and from each of the Territories of Arizona, New Mexico and Hawaii, two delegates from the district of Columbia, and two delegates each from Alaska, Porto Rico and the Philippine Islands. For each delegate elected to this convention an alternate delegate shall be chosen to serve in case of the absence of his principal.

Delegates-at-large.

The delegates-at-large and their alternates shall be elected by popular State and Territorial conventions, of which at least thirty days' notice shall have been published in some newspaper or newspapers of general circulation in the respective State or Territory.

ngres- nal dis- ct dele- tes.

The Congressional district delegates shall be elected by convention called by the Republican Congressional committee of each district, of which at least thirty days' notice shall have been published in some newspaper or newspapers of general circulation in the district; provided, that in any Congressional district where there is no Republican Congressional committee, the Republican State Committee shall be substituted for and represent the Congressional Committee in issuing said call and making said publication; and provided, that delegates both from the State at large and their alternates may be elected in conformity with the laws of the State in which the election occurs; provided, the State Committee or any such Congressional committee so direct; but, provided further, that in no State shall an election be so held as to prevent the delegates from any Congressional district and their alternates being selected by the Republican electors of that district.

istrict of olumbia.

The election of delegates from the District of Columbia shall be held under the direction and supervision of an election board composed of Sidney Bieber, Percy Cranford and George F. Collins of the District of Columbia. This board shall have authority to fix the date of said election, subject to prior provisions herein, and to arrange all details incidental thereto, and shall provide for a registration of the votes cast, such registration to include the name and residence of each voter.

erritories.

The delegates from the Territories of Arizona, New Mexico, Hawaii and from Alaska shall be selected in the manner of selecting delegates at large from the States as provided herein.

The delegates from Porto Rico and the Philippine Islands shall be elected in conformity with certain rules and regulations adopted by this committee, copies of which are to be furnished to the governing committees of the Republican party in Porto Rico and the Philippine Islands.

All delegates shall be elected not earlier than thirty days after the date of this call and not later than thirty days before the date of the meeting of the next Republican National Convention.

edentials.

The credentials of each delegate and alternate must be for-

warded to the secretary of the Republican National Committee at Washington, D.C., at least twenty days before the date fixed for the meeting of the convention, for use in making up its temporary roll.

In any case where more than the authorized number of delegates from any State, Territory or delegate district are reported to the secretary of the National Committee a contest shall be deemed to exist, and the secretary shall notify the several delegates so reported, and shall submit all such credentials and claims to the whole committee for decision as to which delegates reported shall be placed on the temporary roll of the convention.

All notices of contest shall be submitted in writing, accompanied by a printed statement setting forth the grounds of contest, which must be filed with the secretary of the committee twenty days prior to the meeting of the National Convention.

ELMER DOVER, Secretary.
HARRY S. NEW, Chairman.

While the composition of the Democratic convention is practically the same as that of the Republican convention, the mode of choosing delegates differs in many states; for, as the following call indicates, a larger freedom is given to the Democratic organization of each state in the choice of its quota of delegates.

WASHINGTON, D.C., January 18, 1904.

The Democratic National Committee, having met in the City of Washington on the 12th day of January, 1904, has appointed Wednesday, July 6, 1904, as the time, and chosen St. Louis, Missouri, as the place for holding the Democratic National Convention.

Each State is entitled to representation therein equal to double the number of its Senators and Representatives in the Congress of the United States, and each Territory, Alaska, Indian Territory and the District of Columbia shall have six delegates. All Democratic citizens of the United States who can unite with us in the effort for a pure and economical constitutional government are cordially invited to join us in sending delegates to the Convention.

JAMES K. JONES, Chairman.
C. A. WALSH, Secretary.

67. *Convention Oratory*

The nomination of the candidates for the presidency and vice presidency is, of course, the chief business of a national convention and the point around which the party warfare is waged. The placing of the various candidates before the convention is a high art, and although it seldom has much effect on the outcome of the balloting, the presentation speech is regarded as an occasion for oratory of a peculiarly American type. The following extract from a speech by Mr. Martin W. Littleton, nominating Mr. Alton B. Parker in 1904, may be regarded as illustrating convention oratory of a superior character:

The country, anxious to win in this great crisis, called upon New York as the battleground. New York answers with a candidate who carried the State by sixty thousand majority. (Applause.) The country called upon New York for the best of its brain and blood, and New York answers with a man who cut his way through poverty and toil until he found the highest peak of power and honor in the State. (Applause.) The country called upon New York for a Democrat, and New York answers with a man who learned the simple lessons of Democratic faith in the furrowed field, who took them with increasing strength to the bar and finally honored them by his exalted station on the bench — a man who, throughout his career from poverty to power, never in fair weather or foul forsook the standards of his party faith or deserted the colors of his command. (Applause.) As my brilliant and amiable and distinguished friend, Senator Daniel, of Virginia, says, a Democrat who never scratched the ticket in all his life. (Applause.) The country called upon New York for a Democrat free from factional dispute, and New York answers with a man friendly to all factions, but a favorite, or afraid of none; a man who will take counsel and courage of both, but who will take the bitterness of neither — a man who will not stir the hatred of the past nor share the acrimony of the present, but who will lead us up toward the future into a cloudless atmosphere of party peace. (Applause.) The country called upon New York for a man who measured up to the stature

of this lofty place, and New York answers with a candidate who grew from youth to man in the humble walks of life; who lived and learned what all our common folk must live and learn; a man who ripened with advancing years in the rich attainments of the law until he went, by choice of those who knew him best, to hold the heavy scale of justice at the highest point of our great judicial system, where, with the masters who moulded State and Nation, and the men who drive commerce o'er the wheel of Time, he surveyed to the very ground every inch of this great Republic and saw with expanding vision the material growth and glory of his State. (Applause.)

Mr. Pa will obe the Con stitution

The country called upon New York for a man to fit this, the critical hour and place in our national life, and New York answers with a man who puts against the strenuous sword play of a swaggering administration, a simple faith in all the perfect power of the Constitution (applause); a man who puts against an executive republic the virtue of a constitutional republic; a man who puts against executive usurpation a knowledge of and a deep love for the poise and balance of its three great powers; a man who puts against the stealthy hunt "with the big stick" a faithful observance of constitutional restraints. The country called upon New York for a man of stainless character in private and public life, and New York answers with a man whose path leads from the sweet and simple fireside of his country home where he enjoys the gentle society of his family, to his place of labor and honor at the head of one of the greatest courts of Christendom. And nowhere through his active and useful life has aught but honest praise found utterance on the lips of those who know him best. (Applause.) If you ask me why he has been silent, I tell you it is because he does not claim to be the master of the Democratic party, but is content to be its servant. (Applause.) If you ask me why he has not outlined a policy for this Convention, I tell you that he does not believe that policies should be dictated, but that the sovereignty of the party is in the untrammeled judgment and wisdom of its members (applause); if you ask me what his policy will be, if elected,

I tell you it will be that policy which finds expression in the platform of his party.

With these, as some of the claims upon your conscience and judgment, New York comes to you, flushed with hope and pride. We appeal to the South, whose unclouded vision and iron courage saw and fought the way for half a century; whose Jefferson awoke the dumb defiance of development into a voice that cried out to the world a curse upon the rule of kings and a blessing upon a new-born republic; whose Madison translated the logic of events and the law of progress into the Constitution of the country; whose Jackson reclaimed the lost places of the far South and democratized the politics of the nation; and whose soldiers showed the wondering world the finest fruits of brain and nerve and heart that ripen in her temperate sun, and who, through all the sons she lost, and all the sons she saved and all the tears she shed amid the sorrowful ruins of war — and through all the patient loyalty and labor of after years so wrought for human happiness that all the world exclaims, "Her greatness in peace is greater than her valor in war." We appeal to you of the Old South and the New to join with us in this contest for the supremacy of our party. We appeal to the West, whose frontier struggles carried our civilization to the Pacific slopes, whose courage conquered the plain and the forest, and whose faithful labor has built beautiful cities clear through to the Rocky Mountains. We appeal to you, as he did follow your leadership through eight long years of controversy, you turn and follow him now when victory awaits us in November. We appeal to New England, faithful sentinel among her historic hills, in the name of all her unfaltering and brilliant Democrats, living and dead, to join us in our labor for success. (Applause.)

We appeal to every Democrat from everywhere to forget the bitter warfare of the past; forget the strife and anger of the older, other days; abandon all the grudge and rancor of party discontent, and, recalling with ever increasing pride, the triumphs of our fifty years of a constitutional government of Liberty and Peace — here and now resolve to make the future record that resplendent

reach of time in which Liberty and Peace went up and down the nations of the earth, building their kingdom in the hearts of men and gathering the harvest of genius and toil; in which reason struck from the hand of force the sword of hate and plucked from the heart of war the germ of greed; in which conscience smote the thoughts of wrong and filled the mind with mercy's sweet restraint; in which power grew in the human brain, but refused the shelter of a glittering crown; in which the people of all lands and tongues, awakened to hope by the inspiration of our example, turned their faces toward the light of our advancing civilization and followed with the march of years the luminous pathway leading to a destiny beyond the reach of vision and within the providence of God. In this spirit New York nominates for President of the United States Alton B. Parker.

68. *The Democratic Unit Rule*

The delegates of a state at a Republican convention may vote either according to their individual preferences or the instructions received from the local and state conventions sending them, and thus a state delegation may be, and often is, divided against itself. In the Democratic party, however, a majority of the delegates of any one state may decide how the vote of the entire delegation is to be cast. The practice is illustrated by the application of the principle to an appeal of the Ohio delegation at the Democratic national convention in 1904.

Demand for a poll of the vote

Mr. Thomas McNamara, of Ohio (when the vote of Ohio was announced): I demand that the Ohio delegation be polled.

The Presiding Officer: Does the gentleman question the correctness of the figures?

Mr. McNamara: I do.

The Presiding Officer: Then the gentleman from Ohio is entitled to a poll of the delegation.

The delegation was polled and the result was announced Parker 28, Hearst 6, McClellan 9, Cockrell 2, Olney 1.

Mr. E. H. Moore, of Ohio: I rise to a point of order.

The Presiding Officer: The gentleman will state his point of order.

Can the Ohio vote be divided?

Mr. Moore: I desire the ruling of the Chair upon the question whether or not the vote of Ohio can be cast as a unit. The district delegates are chosen in Ohio, not as they are in New York or Indiana, by delegates elected to the State Convention, but by Congressional Conventions held prior to the time of the holding of the State Convention. My point is that the State Convention therefore had no right to instruct these delegates.

Second, the rule, as the Chair will observe, is a modified one. It does not impose upon the delegates the necessity of voting as a unit.

I desire the ruling of the Chair. The district delegates receive their credentials at the District Conventions, held at separate times, by delegates separately chosen, and in no wise hold their credentials from the State Convention. Therefore, our contention is that the State Convention had no power to impose the unit rule upon them.

The Chair lays down the rule.

The Presiding Officer: The Chair overrules the point of order. By express rule of the Democratic Convention, the delegates come from a State and not from districts. Under the call for delegates to this Convention, each State is allowed as many delegates as it has Senators and Representatives, multiplied by two; and those delegates are the delegates of the State and not the delegates of the districts, no matter how chosen. And even if the call itself did not determine the point of order, the express rule of Democratic National Conventions does determine.

The point of order is overruled, and the poll of the Ohio delegation showing that Parker has received twenty-eight of the forty-six votes to which that State is entitled in this Convention, the vote of Ohio will stand as announced by the Chairman of that delegation [*i.e.* forty-six for Parker].

69. *The Chairman of the National Committee*

The direction of the presidential campaign falls principally on the chairman of the national committee, who is selected by the presidential candidate of the party in consultation with his leading advisers. The power of this extra-legal officer in managing political affairs is thus described by Mr. Rollo Ogden in the *Atlantic Monthly*:—

Mr. Ha and the campaig 1896.

Senator Hanna has outstripped all his predecessors in making the chairmanship of the national committee a centre of political power. Happy accidents have conspired with great skill and determination on his part to bring about such a consummation. He has now [1902] held the office continuously for five years — indeed practically for seven years. It was in 1893 or 1894 that Mr. Hanna, then little known outside of Ohio, set about in his long-headed and far-planning way, the election of Mr. McKinley to the presidency. He perceived the thickening signs of a political reaction and in them he saw the great opportunity for his friend Mr. McKinley, and also for himself. The history of that campaign before the campaign of 1896 has never been written; but enough of it is known to show the signal ability and resolution with which it was planned and fought. Long before the Republican convention met, old masters like Senators Chandler, Quay and Platt recognized the rise of a political manipulator greater than themselves. This is referred to at present only to make the point that Mr. Hanna was party chairman in fact two years before he became so in name.

In the course of those preliminary manœuvres he had swept everything before him so that his accession to the chairmanship was foregone. On the heels of that came his election to the Senate. This both heightened his prestige and put him in a position to assert and extend his power as National Chairman. In the latter capacity (counting his two years or more of antecedent campaigning for the nomination of Mr. McKinley in 1896) he had made a host of pre-election pledges. His post in the Senate enabled him

to see that they were carried out. Never, it is safe to say, did a party chairman previously have so much to do with the apportionment of party patronage. The president gave him substantially a free hand in the South. Then there came along the Spanish war, yielding our Cæsar chairman further meat on which to grow great. Thousands of new appointments had to be made. For each applicant the endorsement of Chairman Hanna was eagerly sought. His power grew by power. After four years of its gradual increase came another successful campaign for the presidency under his management. . . .

It is difficult to set off, each by itself, the elements of the political power of the party national committee, vested largely in its chairman, for the reason that they are all inextricably interdependent. The chairman has the spending of vast sums of money: this gives him political power. But he has the money to spend only because he is first in a position of political power. So of his rights of patronage; of control of party conventions, big and little; of his dictation in both party manœuvring and public legislation: all these things dovetail into one another and appear now as a cause, now as a consequence. . . . He has, for example, millions of dollars to disburse. There is good authority for the assertion that the Republican campaign fund of 1896 was upwards of seven millions of dollars. Mr. Hanna argued in 1900 that it ought to be twice as great, — presumably because the country was twice as prosperous. At all events, he was not cramped for funds in either year. Now the outlay of such huge sums necessarily means an increment of power for the man who controls it. Such will be the case if he is the most unselfish and incorruptible of mortals. Money is power in politics as everywhere else. A chairman who may determine how much is to be allotted to this state, that congressional district, this city and the other county, becomes inevitably the master of many political legions. There is no need of a hard-and-fast understanding between the giver and the recipient, — least of all any corrupt bargain. Common gratitude and the expectation of similar favors to come are enough

to bind fast the nominee for congress, the candidate for a senatorship, or the member of the national committee for any given state, a part of whose campaign expenses has been kindly paid for him from headquarters. It is really hard to think ill of the man who has sent you a large check. To oppose your humble opinion to his necessarily large and enlightened view of party policy and public advantage is sheer presumption. To vote for him or with him or as he bids you is thereafter obviously the line of least resistance. Thus it is that the bread which the national chairman casts upon the waters returns to him after not so many days.

The chairman and party finance.

The pecuniary aspect of the chairman's power has another feature. He collects as well as pays out; and with many of the collections goes an express or tacit party obligation which he alone is fully cognizant of, and which it is his particular duty to see carried out. Rich men do not always contribute to party in obedience to the Scriptural injunction to give, asking not again. They make conditions either openly, or by hint, or gesture. . . . Our own wealthy contributors to the party treasury have been suspected of coupling their gifts with an understanding about the tariff, about the seal fisheries, about ship subsidies and what not. It is not necessary to go into this.

70. *The National Campaign* *

The waging of a great contest designed to influence millions of voters is a remarkable undertaking, the character of which may be partially estimated by this account of the methods adopted by the Republican party organization in the memorable "campaign of education," in 1896: —

The pamphlet literature.

Since the beginning of the campaign the Republican National Committee has issued the astounding total of over two hundred millions of copies of documents. There were also issued, under the direction of the same committee, about fifty million copies of documents from the headquarters of the Republican Congressional Campaign Committee at Washington. All this work has

been done through the Bureau of Publication and Printing. There have been prepared more than 275 pamphlets and leaflets, besides scores of posters, sheets of cartoons, inscriptions and other matter touching on various phases of the campaign issues. The distribution of these documents was generally made through the state central committees. About 20,000 express packages of documents were shipped, nearly 5000 freight packages, and probably half a million packages by mail. These documents were printed in German, French, Spanish, Italian, Swedish, Norwegian, Finnish, Dutch and Hebrew, as well as in English.

Arrangements with the newspapers.

The duties of the editorial department of the Republican Literary Bureau at Chicago did not end with the preparation of the many documents to which allusion has been made, but some notion of the extent of those duties may be had when the fact is stated that a preferred list of country newspapers, with an aggregate weekly circulation of 1,650,000, received three and a half columns of specially prepared matter every week; another list of country newspapers, with an aggregate weekly circulation of about 1,000,000, received plate matter; three special classes of country weekly and daily papers were supplied with statements aggregating about 3,000,000 copies every week, and lastly, a special class of country newspapers received "ready prints" — the entire weekly circulation being about 4,000,000 copies. Hundreds of other newspapers depended in a large measure for their political matter during the campaign upon the Publication and Printing Bureau and were circulated under the direction of this bureau. It is a safe estimate that every week 5,000,000 families received newspapers of various kinds containing political matter furnished by this bureau, — probably three times the aggregate in volume and influence of any newspaper work ever before conducted by a national political committee.

The use of posters.

The Republican Committee also made large use of political posters, probably 500 being circulated under the direction of the Publication and Printing Bureau. The most popular poster sent out from Chicago was the five-colored, single-sheet lithograph,

so widely circulated at the St. Louis convention, bearing a portrait of Mr. McKinley with the inscription underneath, "The Advance Agent of Prosperity." The number of copies of this poster circulated is said to have been almost beyond computation or comprehension. Another poster which had an immense run was in plain black and bore the title, "The Real Issue." It represented McKinley addressing a multitude of laborers in front of factories, declaring that it was better to open the mills of the United States than the mints, while Mr. Bryan, on the other side in front of the United States mint, was welcoming the people of all races with their silver bullion for free coinage. The great volumes of factory smoke and the throng of eager workmen on McKinley's side were in strong contrast with the group of foreigners dumping their silver in front of the Bryan mints. . . .

The congressional committee's work.

The work of the congressional campaign committees has been far more important this year than ever before. The Republican committee, under the chairmanship of the Hon. J. W. Babcock of Wisconsin, has been hard at work since early in June, and, like the National Committee at Chicago, it has broken its own record. The committee has printed 23 different documents. Of a single speech in Congress, that delivered by Representative McCleary of Minnesota in the House last February, in reply to his colleague, Representative Towne, the committee has issued 2,500,000 copies. Another popular money document issued by the committee was Representative Babcock's speech on the history of money and financial legislation in the United States. In the list of pamphlets sent out by the committee were speeches by Senator Sherman, Mr. Blaine, Representative Dingley, Speaker Reed and others. The committee did not restrict itself to the distribution of Congressional speeches, but chose such other ammunition as seemed adapted for the purpose in view. A pamphlet of forty pages was prepared, dealing with the silver question in a conversational way, and this, although one of the longest, proved to be one of the most popular demands sent out. The silver question was not treated wholly to the exclusion of the tariff in these

documents, but in the latter weeks of the campaign it was found that the demand for tariff literature gradually increased and a large proportion of the documents distributed from Washington dealt with that subject.

ıe tariff erature.

The distribution of Republican literature from New York City was placed in the hands of the American Protective Tariff League. Some twenty millions of documents were sent out from the headquarters in West Twenty-third Street, New York City, to points east and north of the Ohio River. Each Congressional district in the territory covered was assigned a pro rata quota of documents, and additional shipments were made from time to time as required. The League's own work of editing and printing material for campaign purposes was done in a most systematic and admirable manner.

ımpaign atory.

Considering the remarkable expenditures for the dissemination of argument by means of the printed page, the poster, and the cartoon, it might have been supposed that in this campaign oratory would have had but a minor part. Then, too, the economic and statistical problems of a nation's currency have not usually lent themselves with grace to the fiery utterances of the political orator. But in this respect also the present year's campaigning has been exceptional. The oratorical powers of the opposing candidates had not a little to do with the winning of each nomination — in the one case directly, in the other just as truly if less conspicuously. Mr. Bryan set his own pace in his Chicago convention speech. Mr. McKinley was known at the start as one of the greatest campaign orators of his time. Neither of these men could be forced to obey the tradition which required silence of presidential candidates.

r. Bryan's ıenomenal cord.

Mr. Bryan's speechmaking record has been the most wonderful one in the history of American presidential campaigns. Poor Horace Greeley's famous tour in 1872 and Mr. Blaine's extended journeyings in 1884 are made to seem insignificant in comparison. On the night before election, if present plans are carried out, Mr. Bryan will have made about four hundred reported speeches

in twenty-nine states. No previous candidate for the presidency ever attempted such a feat as this. Day after day this speech-making has gone on — much of it from the rear platforms of railway trains, while the telegraph and the daily newspaper have carried the speaker's utterances everywhere. Here again must be considered the matchless service of the press, without which the orator's words could reach but a limited number.

Mr. McKinley speaks at home.

But for Mr. McKinley too, this has been a speechmaking campaign. He has remained at his home in Canton, but auditors have come to him from far and near. There is a precision, a fixed adherence to schedule, in the arrangements for receiving and addressing delegates at Canton which is wholly lacking in the Bryan "steeple chasing" programme. Mr. McKinley's speeches have been prepared with care and fully reported by the press.

CHAPTER X

THE POWERS OF THE PRESIDENT

71. *Constitutional Provisions*

THE following brief clauses of the federal Constitution sum up the powers [1] and duties of the chief magistrate: —

1. The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States; he may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments.

3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions, which shall expire at the end of their next session.

He shall, from time to time, give to the Congress information of

[1] The general executive power is also vested in the President; see above, p. 154.

the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them; and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.[1]

Duties of President

72. *The President as Head of the National Administration**

The relation of the great executive departments to the President on one hand, and to Congress on the other, has never been nicely defined, and indeed it cannot be, from the very nature of the case. Congress, having power to create the departments and prescribe their duties, may obviously narrowly restrict the head officer. This seems entirely necessary and proper, but it is also obvious that, while the main outlines of the movements of the executive may be marked out, "there are numberless things which cannot be anticipated and defined, and are essential to useful and healthy action of government."[2] The whole problem is discussed in an opinion by Attorney General Cushing in 1855, from which a few extracts are given here: —

Constitutional provisions for subdivision of executive functions

Now, by the explicit and emphatic language of the Constitution, the executive power is vested in the President of the United States. In the perception, however, of the fact that the actual administration of all executive power cannot be performed personally by one man, — that this would be physically impossible, and that if it were attempted by the President, the utmost ability of that one man would be consumed in official details instead of being left free to the duty of general direction and supervision, — in the perception, I say, of this fact, the Constitution provides for the subdivision of the executive powers, vested in the President, among administrative departments, using that term now in its narrower

[1] For his veto power, see below, p. 217.

[2] This question is considered in Fairlie, *National Administration of the United States*, pp. 16 *sqq.*

and ordinary sense. What those "executive departments" shall be, either in number or functions, the Constitution does not say, any further than to determine that certain appointments may be made by their "heads," respectively, and that the President may require in writing the advice of any such "head" or "principal officer in each of the Executive Departments," for which reason those officers are sometimes characterized, and not improperly, as "constitutional advisers" of the President. Meanwhile, the great constitutional fact remains, that the "executive power" is vested in the President, subject only, in the respect of appointments and treaties, to the advice and consent of the Senate.

The creation of the first departments.

To constitute the "executive departments," through the instrumentality of which, in part, the President was to administer government, became one of the earliest objects of the first constitutional Congress; and we must look to its acts for knowledge of the administrative system, which, in its great outlines, the statesmen of the constitutional era established as it exists at this day. They commenced with the erection of a Department of Foreign Affairs, (soon afterwards changed to the Department of State). A few days afterwards the Department of War was created, with "a principal officer," the "Secretary for the Department of War." Next came the Treasury Department, with "a Secretary of the Treasury, to be deemed the head of the Department." Following this act is that establishing "the Post Office," with "a Postmaster General, to be subject to the direction of the President of the United States in performing the duties of his office, and in forming contracts for the transportation of mail." Finally, came the act providing that "there shall also be appointed a meet person, learned in the law, to act as Attorney General for the United States."

Executive departments are under the President's direction.

Such were the great departments of administration, with which the business of the Government of the United States commenced. Changes in detail were made by Congress, or by order of the President, from time to time, by the addition of new functions to this or that department, by change in the distribution of their

respective duties, and at length, by the creation of new departments. But, amid all these successive changes in detail, the original theory of departmental administration continued unchanged, namely, executive departments, with heads thereof discharging their administrative duties in such manner as the President should direct, and being in fact the executors of the will of the President. All the statutes of departmental organization, except one, expressly recognize the direction of the President, and in that one, the Interior, it is implied, because the duties assigned to it are not new ones, but such as had previously been exercised by other departments. It could not, as a general rule, be otherwise, because in the President is the executive power vested by the Constitution, and also because the Constitution commands that *He* shall take care that the laws be faithfully executed; thus making him not only the depository of the executive power, but the responsible executive minister of the United States.

Acts to be performed by the President.

But, if the direction of the President to the executive departments be assumed generally, or at least, in the general statutes of organization, may there not still be cases of distinction in which, by the Constitution or by statute, specific things must be done by the President himself or by Heads of Departments? Such cases do undoubtedly exist, and any view of the subject which omits to consider them, must be partial, defective, imperfect. We begin with examples of acts performable by the President, as prescribed by the Constitution. Thus it may be assumed that he, the man discharging the presidential office, and he alone, grants reprieves and pardons for offences against the United States, not another man, the Attorney General or anybody else, by delegation of the President. So he, and he alone, is the supreme commander-in-chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States. That is a power constitutionally inherent in the person of the President. No act of Congress, no act even of the President himself, can, by constitutional possibility, authorize or create any military officer not subordinate to the President.

So he appoints and removes ambassadors and other officers of the United States, in the cases and with the qualifications indicated by the Constitution. So he approves or disapproves of bills which have passed both Houses of Congress: that is a personal act of the President like the vote of a Senator or Representatives in Congress, not capable of performance by a Head of Department or any other person.

hat must e Presi- nt do rsonally?

But the question, whether a given duty is to be the immediate deed of the President, or to be performed by delegation, does not seem to depend, at least in all its degrees, upon the fact of its being expressly enumerated in the Constitution; for, in certain stages of the negotiation of a treaty, anterior to and including its signature, he delegates full powers to another person. But, after all, it must be communicated by the President to the Senate, and it does not become the effective law of the land until there is exchange of ratifications, officially made and proclaimed by the President. At the same time, be it observed that, in the Constitution, no case occurs of the communication of power directly to any Head of Department, except in the respect of the appointment of such inferior officers as may be intrusted to them by act of Congress. We shall have reason to conclude, in the sequel, that even this cannot be regarded as a power independent of that of the President.

atutes not niform in stribution executive nctions.

On an examination of the whole body of the statutes of the United States, it will be found that, in the designation of executive acts to be performed, there is no uniformity of language, no systematic style of legislation. Sometimes a statute says the President shall perform the act, — sometimes that this or that Secretary shall perform it, — without there being, in general, any constitutional or legal distinction between the authority of the respective acts, all of them being of things which, on the one hand, the President may, if he please, delegate to a Head of Department, and which, on the other hand, cannot be done by a Head of Department without direction of the President.

Take now the converse form of legislation, that common or

most ordinary style, in which an executive act is, by law, required to be performed by a given Head of Department. I think here the general rule to be as already stated, that the Head of Department is subject to the direction of the President. I hold that no Head of Department can lawfully perform an official act against the will of the President; and that will is by the Constitution to govern the performance of all such acts. If it were not thus, Congress might by statute so divide and transfer the executive power as utterly to subvert the Government, and to change it into a parliamentary despotism, like that of Venice or Great Britain, with a nominal executive chief utterly powerless, — whether under the name of Doge or King, or President, who would then be of little account, so far as regards the question of the maintenance of the Constitution.[1]

Departm heads ca not act against t President

Without enlarging upon this branch of the inquiry, it will suffice to say that, in my opinion, all the cases in which a Head of Department performs acts, independent of the President, are reducible to two classes, namely: first, acts purely ministerial; and, secondly, acts in which the thing done does not belong to the office, but the title of the office is employed as a mere *designatio personæ*.

To elucidate my thought in this respect, let us look into the daily course and routine of administration.

The Secretary of State is constantly receiving communications from the public ministers and consuls of the United States abroad, from foreign ministers accredited to the United States, and from private citizens having concerns in his department, and he is dispatching letters, instructions, orders, in return, to all parts of the world. The Secretary of the Treasury is in communication with collectors, assistant-treasurers, disbursing agents, and many other officers, as also with private individuals in all the multifarious business of his department. The Secretary of War and the Secretary of the Navy are receiving applications from, and addressing instructions and orders to, all the officers of the Army and Navy, and contractors and others persons within the juris-

Ordinary duties of executive heads.

[1] For an opposite view, see below, p. 200.

diction of their respective departments. The Postmaster General is in like communication with the host of deputies, contractors, and agents engaged in or affected by the mail service of the United States. Each of these Heads of Departments is continually passing upon applications for service and accounts of expenditure, appertaining to his branch of the business of the Government.

ıen the ːsident ıst be ısulted.

Now, all these multifarious acts are under the constitutional direction of the President. In legal theory, they are his acts. But a large proportion of them are performed by his general direction, without any special direction. If a Secretary doubt whether he has any general direction covering a given question, — if the question be new in principle or application, and he doubts what the President would choose to have done in the premises, — if he doubts, in his own conscience, what should be done and therefore needs the guidance of the President, — if, in fine, the act be one of grave public responsibility, and he shrinks from deciding it of himself, — in all these contingencies he will consult the President.

rbal ections the ːsident.

On such consultation, in the great majority of cases, the Secretary will take and act upon the verbal direction of the President, because the object of the consultation is, in general, to ascertain the President's will, or at most to determine, by conference and comparison of thought, what the public interest requires, just as in the last relation the President himself consults any one or all of the members of the Cabinet.

itten ections.

But the case may and often does happen, in which the Secretary desires, or the President chooses, to give a written direction. In this contingency the responsibility of the act done continues to be shared in common by the President and the Secretary; but a direct and more individual responsibility, legal and moral, is assumed by the President. Just so it is in principle, but with inversion of responsibility, when the President, in regard to some line of public policy to be adopted by him, or some general or superior direction to be given, demands the written advice of the Heads of Departments.

In a word, while there is a general solidarity of responsibility for public measures, as between the President and the Heads of Department, and while a general responsibility of direction is attributable to the President and of execution to the Heads of Department, yet the weight of historical responsibility, and perhaps of legal, may be shifted partially from one to another, according as the determination is governed or evidenced by the written direction of the President or by the written advice of the Head of Department.

The question of responsibility

73. *The President as National Spokesman in Foreign Affairs*

Early in the history of our republic, Thomas Jefferson as Secretary of State laid down in the following letter to M. Genet, the diplomatic representative of France, the proposition that the President was to be regarded as the sole person authorized to speak with authority for the United States on the conduct of foreign affairs.

SIR, — In my letter of October 2, I took the liberty of noticing to you that the commission of consul to M. Dannery ought to have been addressed to the President of the United States; he being the only channel of communication between this country and foreign nations, it is from him alone that foreign nations or their agents are to learn what is or has been the will of the nation, and whatever he communicates as such, they have a right, and are bound to consider as the expression of the nation, and no foreign agent can be allowed to question it, to interpose between him and any other branch of the government, under the pretext of either's transgressing their functions, nor to make himself the umpire and final judge between them.

The will of the nation is expressed through the President.

I am, therefore, sir, not authorized to enter into any discussions with you on the meaning of our constitution in any part of it, or to prove to you that it has ascribed to him alone the admission or interdiction of foreign agents. I inform you of the fact by authority from the President. I had observed to you that we were persuaded that in the case of the consul Dannery, the errour in the

The President's authority cannot be questioned.

address had proceeded from no intention in the executive council of France to question the functions of the President, and therefore no difficulty was made in issuing the commission. But in your letter of the 14th instant, you *personally* question the authority of the President and in consequence of that have not addressed the commissions of Messrs. Pennevert and Chervi, making a point of this formality on your part; it becomes necessary to make a point of it on ours also; and I am therefore charged to return to you those commissions, and to inform you that, bound to enforce respect to the order of things established by our constitution, the President will issue no exequatur to any consul or vice-consul, not directed to him in the usual form, after the party from whom it comes has been apprized that such should be the address. I have the honour to be, &c.

TH. JEFFERSON.

74. *The War Powers of the President*

The indefinite character of the war power.

There is an old saying to the effect that in times of war the laws are silent, and from the nature of the case this must be to a great extent true, even in the most democratic governments. The critical problems of conducting a campaign must be met with decision, promptness, and consistent action in which appropriate means are adapted to the end sought — the achievement of victory. Clearly the powers of the President as chief magistrate and commander-in-chief cannot be narrowly laid down in definite rules. Accordingly, there will always be differences of opinion as to the validity of acts of the President under his military authority, but the following statement by President Polk, in defense of his policy of levying contributions in Mexico, seems to be a fair interpretation of the power of the President in the conduct of war.

Constitutional provisions.

By the Constitution the right to "declare war" is vested in Congress, and by the same instrument it is provided that "the President shall be Commander in Chief of the Army and Navy of the United States" and that "he shall take care that the laws be faithfully executed."

When Congress have exerted their power by declaring war against a foreign nation, it is the duty of the President to prosecute it. The Constitution has prescribed no particular mode in which he shall perform this duty. The manner of conducting the war is not defined by the Constitution. The term *war* used in that instrument has a well-understood meaning among nations. That meaning is derived from the laws of nations, a code which is recognized by all civilized powers as being obligatory in a state of war. The power is derived from the Constitution, and the manner of exercising it is regulated by the laws of nations.

The President controlled by the law of nations.

When Congress have declared war, they in effect make it the duty of the President in prosecuting it, by land and sea, to resort to all the modes and to exercise all the powers and rights which other nations at war possess. He is invested with the same power in this respect as if he were personally present commanding our fleets by sea or our armies by land. He may conduct the war by issuing orders for fighting battles, besieging and capturing cities, conquering and holding the provinces of the enemy, or by capturing his vessels and other property on the high seas. But these are not the only modes of prosecuting war which are recognized by the laws of nations and to which he is authorized to resort. The levy of contributions on the enemy is a right of war well established and universally acknowledged among nations, and one which every belligerent possessing the ability may properly exercise. The most approved writers on public law admit and vindicate this right as consonant with reason, justice and humanity.

How the President may conduct war.

Upon the declaration of war against Mexico by Congress the United States were entitled to all the rights which any other nation at war would have possessed. These rights could only be demanded and enforced by the President, whose duty it was, as "Commander in Chief of the Army and Navy of the United States," to execute the law of Congress which declared the war. In the act declaring war Congress provided for raising men and money to enable the President "to prosecute it to a speedy and successful termination." Congress prescribed no mode of conducting it,

Congress cannot prescribe the details of campaig

but left the President to prosecute it according to the laws of nations as his guide. Indeed, it would have been impracticable for Congress to have provided for all the details of a campaign. . . .

any war wers not fined in e Con- itution.

The right to blockade the ports and coasts of the enemy in war is no more provided for or prescribed by the Constitution than the right to levy and collect contributions from him in the form of duties or otherwise, and yet it has not been questioned that the President had the power after war had been declared by Congress to order our Navy to blockade the ports and coasts of Mexico. The right in both cases exists under the laws of nations. If the President cannot order military contributions to be collected without an act of Congress, for the same reason he cannot order a blockade; nor can he direct the enemy's vessels to be captured on the high seas; nor can he order our military and naval officers to invade the enemy's country, conquer, hold, and subject to our military government his cities and provinces; nor can he give to our military and naval commanders orders to perform many other acts essential to success in war.

rge war wers cessary success.

If when the City of Mexico was captured the commander of our forces had found in the Mexican treasury public money which the enemy had provided to support his army, can it be doubted that he possessed the right to seize and appropriate it for the use of our own Army? If the money captured from the enemy could have been thus lawfully seized and appropriated, it would have been by virtue of the laws of war, recognized by all civilized nations; and by the same authority the sources of revenue and of supply of the enemy may be cut off from him, whereby he may be weakened and crippled in his means of continuing or waging the war. If the commanders of our forces, while acting under the orders of the President, in the heart of the enemy's country and surrounded by a hostile population, possess none of these essential and indispensable powers of war, but must halt the Army at every step of its progress and wait for an act of Congress to be passed to authorize them to do that which every other nation has the right to do by virtue of the laws of nations, then, indeed, is the Govern-

ment of the United States in a condition of imbecility and weakness, which must in all future time render it impossible to prosecute a foreign war in an enemy's country successfully or to vindicate the national rights and the national honor by war.

75. *The Political Implications of the Veto Power* *

The origi purpose of the vet power.

According to the theory of the Constitution as expounded by Hamilton, it was the intention of the Framers that the veto should be used to protect the executive from encroachment on his powers by the legislature, and also to prevent hasty and improper legislation. In actual practice, however, the veto has often been used for purely political purposes to further the policies of the executive. The methods employed by President Jackson are described and criticised by Mr. Webster in the following speech, in which he calls attention not only to the regular veto, but also to another kind of negative in form of a flat refusal to execute laws duly passed.[1]

The practice o early Pre dents.

Mr. President, among the novelties introduced into the government by the present administration is the frequent use of the President's negative on acts of Congress. Under former Presidents, this power has been deemed an extraordinary one, to be exercised only in peculiar and marked cases. It was vested in the President, doubtless, as a guard against hasty or inconsiderate legislation, and against any act, inadvertently passed, which might seem to encroach on the just authority of other branches of the government. I do not recollect that, by all General Jackson's predecessors, this power was exercised more than four or five times. Not having recurred to the journals, I cannot, of course, be sure that I am numerically accurate in this particular; but such is my belief. I recollect no instance in the time of Mr. John Adams, Mr. Jefferson, or Mr. John Quincy Adams. The only cases which occur to me are two in General Washington's administration, two in Mr. Madison's, and one in Mr. Monroe's. There may be some others; but we all know that it is a power which has been very

[1] For the clause conferring the veto power, see below, p. 217.

sparingly and reluctantly used from the beginning of the government. The cases, Sir, to which I have now referred, were cases in which the President returned the bill with objections.

The silent veto.

The silent veto is, I believe, the exclusive adoption of the present administration. I think, indeed, that some years ago, a bill, by inadvertence or accident, failed to receive the President's signature, and so did not become a law. But I am not aware of any instance, before the present administration, in which the President has, by design, omitted to sign a bill, and yet has not returned it to Congress. But since that administration came into power, the veto, in both kinds, has been repeatedly applied. In the case of the Maysville Road, the Montgomery Road, and the bank, we have had the veto, with reasons. In an internal improvement bill of a former session, in a similar bill at the late session, and in the State interest bill, we have had the silent veto, or refusal without reasons.

How the silent veto is used.

Now, Sir, it is to be considered, that the President has the power of recommending measures to Congress. Through his friends, he may and does oppose, also, any legislative movement which he does not approve. If, in addition to this, he may exercise a silent veto, at his pleasure, on all the bills presented to him during the last ten days of the session; if he may refuse assent to them all, without being called upon to assign any reasons whatever, — it will certainly be a great practical augmentation of his power. Any one, who looks at a volume of the statutes, will see that a great portion of the laws are actually passed within the last ten days of each session. If the President is at liberty to negative any or all of these laws, at pleasure, or rather, to refuse to render the bills laws by approving them, and still may neglect to return them to Congress for renewed action, he will hold a very important control over the legislation of this country. The day of adjournment is usually fixed some weeks in advance. This being fixed, a little activity and perseverance may easily, in most cases, and perhaps in all, where no alarm has been excited, postpone important pending measures to a period within ten days of the close of the

session;[1] and this operation subjects all such measures to the discretion of the President, who may sign the bills or not, without being obliged to state his reasons publicly.

The practice makes the President supreme.

This practical innovation on the mode of administering the government, so much at variance with its general principles, and so capable of defeating the most useful acts, deserves public consideration. Its tendency is to disturb the harmony which ought always to exist between Congress and the executive, and to turn that which the Constitution intended only as an extraordinary remedy for extraordinary cases into a common means of making executive discretion paramount to the discretion of Congress, in the enactment of laws.

The President refuses to execute laws duly passed

Mr. President, the executive has not only used these unaccustomed means to prevent the passage of laws, but it has also refused to enforce the execution of laws actually passed. An eminent instance of this is found in the course adopted relative to the Indian intercourse law of 1802. Upon being applied to, in behalf of the Missionaries, to execute that law, for their relief and protection, the President replied, that, the State of Georgia having extended her laws over the Indian territory, the laws of Congress had thereby been superseded. This is the substance of his answer, as communicated through the Secretary of War. He holds, then, that the law of the State is paramount to the law of Congress. The Supreme Court has adjudged this act of Georgia to be void, as being repugnant to a constitutional law of the United States. But the President pays no more regard to this decision than to the act of Congress itself. The missionaries remain in prison, held there by a condemnation under a law of a State which the supreme judicial tribunal had pronounced to be null and void. The Supreme Court have decided that the act of Congress is constitutional; that it is a binding statute; that it has the same force as other laws, and is as much entitled to be obeyed and executed as other laws. The President, on the contrary, declares that the law of Congress

[1] According to the Constitution any bill not signed by the President fails to become a law if Congress adjourns within ten days of its passage.

has been superseded by the law of the State, and therefore he will not carry its provisions into effect. Now we know, Sir, that the Constitution of the United States declares, that that Constitution, and all acts of Congress passed in pursuance of it, shall be the supreme law of the land, anything in any State law to the contrary notwithstanding. This would seem to be a plain case, then, in which the law should be executed. It has been solemnly decided to be in actual force, by the highest judicial authority; its execution is demanded for the relief of free citizens, now suffering the pains of unjust and unlawful imprisonment; yet the President refuses to execute it.

The President decides how far a law is to be enforced.

In the case of the Chicago Road, some sessions ago, the President approved the bill, but accompanied his approval by a message, saying how far he deemed it a proper law, and how far, therefore, it ought to be carried into execution.

Jackson's theory of his oath to support the Constitution.

In the case of the harbor bill of the late session, being applied to by a member of Congress for directions for carrying parts of the law into effect, he declined giving them, and made a distinction between such parts of the law as he should cause to be executed, and such as he should not; and his right to make this distinction has been openly maintained by those who habitually defend his measures. Indeed, Sir, these, and other instances of liberties taken with plain statute laws, flow naturally from the principles expressly avowed by the President, under his own hand. In that important document, Sir, upon which it seems to be his fate to stand or fall before the American people, the veto message, he holds the following language: "Each public officer who takes an oath to support the Constitution, swears that he will support it as he understands it, and not as it is understood by others."

The logical effect of this theory.

Mr. President, the general adoption of the sentiments expressed in this sentence would dissolve our government. It would raise every man's private opinions into a standard for his own conduct; and there certainly is, there can be, no government, where every man is to judge for himself of his own rights and his own obligations. Where every one is his own arbiter, force, and not law, is

the governing power. He who may judge for himself, and decide for himself, must execute his own decisions; and this is the law of force. I confess, Sir, it strikes me with astonishment, that so wild, so disorganizing a sentiment should be uttered by a President of the United States. I should think that it must have escaped from its author through want of reflection, or from the habit of little reflection on such subjects, if I could suppose it possible, that on a question exciting so much public attention, and of so much national importance, any such extraordinary doctrine could find its way, through inadvertence, into a formal and solemn public act. Standing as it does, it affirms a proposition which would effectually repeal all constitutional and all legal obligations. The Constitution declares, that every public officer, in the State governments as well as in the general government, shall take an oath to support the Constitution of the United States. This is all. Would it not have cast an air of ridicule on the whole provision, if the Constitution had gone on to add the words, "as he understands it"? What would come nearer to a solemn farce, than to bind a man by oath, and still leave him to be his own interpreter of his own obligations?

The President bound by the Constitution as authoritatively interpreted.

Sir, those who are to execute the laws have no more a license to construe them for themselves, than those whose only duty is to obey them. Public officers are bound to support the Constitution; private citizens are bound to obey it; and there is no more indulgence granted to the public officer to support the Constitution only *as he understands it*, than to a private citizen to obey it only *as he understands it;* and what is true of the Constitution, in this respect, is equally true of any law. Laws are to be executed, and to be obeyed, not as individuals may interpret them but according to public authoritative interpretation and adjudication. The sentiment of the message would abrogate the obligation of the whole criminal code. If every man is to judge of the Constitution and the laws for himself, if he is to obey and support them only as he may say he understands them, a revolution, I think, would take place in the administration of justice; and discussions about the law of treason, murder, and arson should be addressed,

not to the judicial bench, but to those who might stand charged with such offences. The object of discussion should be, if we run out this notion to its natural extent, to enlighten the culprit himself how he ought to understand the law.

76. *The Presidential Message*

The Constitution imposes on the President the duty of giving to Congress from time to time information on the state of the Union, and also of recommending to its consideration such measures as he may think necessary and expedient. It does not prescribe whether this shall be done in person or by written communications. The early practice and the origin of the present custom are thus described by Senator Benton.

The early practice of delivery in person.

Under the first two of our Presidents, Washington, and the first Mr. Adams, the course of the British Parliament was followed in answering the address of the President, as the course of the sovereign was followed in delivering it. The Sovereign delivered his address in person to the two assembled Houses, and each answered it: our two first Presidents did the same, and the Houses answered. The purport of the answer was always to express a concurrence, or non-concurrence with the general policy of the government as thus authentically exposed; and the privilege of answering the address laid open the policy of the government to the fullest discussion. The effect of the practice was to lay open the state of the country, and the public policy, to the fullest discussion; and in the character of the answer to decide the question of accord or disaccord — of support or opposition — between the representative and the executive branches of the government.

The origin of the written message.

The change from the address delivered in person, with its answer, to the message sent by the private secretary, and no answer, was introduced by Mr. Jefferson, and considered a reform; but it was questioned at the time, whether any good would come of it, and whether that would not be done irregularly, in the course of the debates, which otherwise would have been done regularly in the discussion of the address. The administration policy would

be sure to be attacked, and irregularly, in the course of business, if the spirit of opposition should not be allowed full indulgence in a general and regular discussion. The attacks would come, and many of Mr. Jefferson's friends thought it better they should come at once, and occupy the first week or two of the session, than to be scattered through the whole session and mixed up with all its business. But the change was made, and has stood, and now any bill or motion is laid hold of, to hang a speech upon, against the measures or policy of an administration.

In the following letter, President Jefferson laid before Congress the reasons which led him to abandon the custom of delivering the message in person: —

December 8, 1801.

The Honorable the President of the Senate:

SIR: The circumstances under which we find ourselves at this place rendering inconvenient the mode heretofore practised of making by personal address the first communications between the legislative and executive branches, I have adopted that by message, as used on all subsequent occasions through the session. In doing this I have had principal regard to the convenience of the Legislature, to the economy of their time, to their relief from the embarrassment of immediate answers on subjects not yet fully before them, and to the benefits thence resulting to the public affairs. Trusting that a procedure founded on these motives will meet their approbation, I beg leave through you, sir, to communicate the inclosed message, with the documents accompanying it, to the honorable the Senate, and pray you to accept for yourself and them the homage of my high respect and consideration.

TH: JEFFERSON.

77. *Executive Influence on Congressional Legislation*

Through his power to send messages and veto laws, the President has the constitutional right to influence the course of legislation in Congress. But he may bring pressure to bear in many other ways. He may use the message as an instrument to rouse public

opinion; he may hold conferences with the directing party leaders in Congress; he may take private members into consultation. To some this extra-constitutional influence of the President seems entirely warranted by sound political practice, for it brings those who have to execute the laws in touch with those who make them, and, furthermore, it enables the President as representative of the whole nation to exercise his proper influence in the management of the nation's business. To others, however, this appears to be a wholly objectionable practice. Both sides of the case are thus stated in a recent debate in Congress: —

The interest of the President in legislation.

MR. DOLLIVER. — I am not one of those who have been irritated by the interest which the President of the United States has taken in this controversy.[1] His interest has been upon the broadest and highest national ground. He has stated his views and convictions to the American people in every section of the country, and not one line can be attributed to him having in it the trace of a partisan outlook upon this great national question. Therefore whatever interest he has taken in it can certainly not be attributed to a partisan design of any kind or character.

Congress often counsels with executive departments.

I have been familiar for a good many years with the attitude of the executive department of the Government toward the work of Congress. There is a member of the Senate now who, if he were disposed to give his experience, would be able to verify what I say, that it has been for many years the no uncommon practice for the Congress of the United States to take counsel with the executive departments in perfecting great acts of national legislation. There are at least five acts of legislation, all of them referring to this and similar questions, that were put through both Houses of Congress in the last five years practically without change, as they came from the office of the Attorney-General of the United States.

The advice of the attorney-general is asked.

In the present controversy the Attorney-General has certainly had the invitation of the legislative branch of the Government to take an interest in the matter. Among the very first things the Committee on Interstate Commerce did was to invite him to

[1] Over the regulation of railway rates.

give his opinion in writing to the Committee explaining to us our powers and making what suggestions he thought desirable in relation to this legislation. It is a difficult, a complex, almost impenetrable subject with which we have been called upon to deal, and I do not propose to be disparaged nor to allow anybody else to be disparaged by a sneering suggestion that we have consulted the Attorney-General or even the President of the United States. I count it just as respectable and just as perfectly in line with my public duty to take counsel with the President of the United States on these questions as for my colleagues and for others to hold sweet counsel with the presidents of railroad corporations. . . .

Congress should not be influenced by views of the President.

MR. BAILEY. — Mr. President, I belong to that very small class of Senators and Representatives who do not believe that it is proper for them to be influenced in the performance of their legislative duties by the views of the executive department and it has never been my practice since I had the honor to occupy a seat in Congress to confer with any President, either of my own or of the opposition party, in respect to any legislation.

An exception.

The only exception I ever made — and that more apparent than real — was in the case of the lamented and martyred McKinley, whose invitation I accepted to confer with him in the hope that we might find a way to avert the war with Spain. Upon a question like that, which was not legislative, I felt that any Member of Congress might properly confer with the Executive of the Republic. But, sir, I have so often seen — and this applies not only to the present President of the United States, but to his predecessors in that great office — I have so often seen the judgment of Congress overruled or controlled by the executive influence that early in my service in the other House I resolved that it should never prevail with me.

The separation of powers.

I remember when a mere school boy reading of a great Virginia Democrat being invited to the White House by a President, of his own party and chosen from his own State, to confer upon an important question pending in the Congress, and I remember

how my youthful blood was made to run faster when I read how that great Virginia Democrat said: "Mr. President, the Constitution of the United States has separated the executive and legislative departments of this Government, and, by the help of God, I intend to keep them separate." I adopted that as my creed and I have lived up to it from that day to this.

78. *How Executive Departments May Draft Bills*

Transmission of a bill to Congress.

While the initiation of legislation is theoretically left to Congress, the President may recommend such measures as he sees fit. These measures need not be limited to mere general statements; they often take the form of completed bills all ready for passage, which are sometimes adopted by Congress without alteration. This message of President Cleveland illustrates the practice.

To the Senate and House of Representatives:

I transmit herewith a communication of the 15th instant from the Secretary of the Interior, submitting, with accompanying papers on the subject, a draught of a bill to amend section 5388 of the Revised Statutes of the United States relating to timber depredations upon lands reserved or purchased for military, Indian, or other purposes, &c.

This is an important subject, and is commended to the early attention of Congress.

GROVER CLEVELAND.

Executive Mansion, December 21, 1885.

CHAPTER XI

THE NATIONAL ADMINISTRATION

79. *The President's Power of Removal* *

WHILE giving the President power to appoint officers by and with the advice and consent of the Senate, the Constitution makes no express provision as to how undesirable officers should be removed. By practical experience, however, it has been found that no executive can assume responsibility for an administration unless he can keep the subordinate officials up to a high standard of efficiency through the disciplinary power of removal. That this power is possessed by the President under the Constitution is the theme of the following decision by the Supreme Court.

The facts as they appear in the findings of the Court of Claims are that the appellant was nominated on July 17, 1890, to be one of the general appraisers of merchandise under the act of June 10, 1890, chapter 407, 26 Stat. 131, and that nomination was consented to on the following day by the Senate, and the appellant was thereupon commissioned to be such general appraiser of merchandise. He accepted that office and took the oath required on July 24, 1890, and remained in such office and was paid the salary attaching thereto up to May 15, 1899. On May 3 of that year he received the following communication from the President: The facts in the case.

EXECUTIVE MANSION,
WASHINGTON, D.C., May 3, 1899.

SIR: You are hereby removed from the office of general appraiser of merchandise, to take effect upon the appointment and qualification of your successor.

WILLIAM MCKINLEY.

The appellant never resigned his office nor acquiesced in any attempted removal therefrom, and he was never notified or informed of any charges made against him, either of inefficiency, neglect of duty or malfeasance in office, and he knows of no cause for his removal from the office having been ascertained or assigned by the President.

Mr. Justice Peckham, after making the foregoing statement delivered the opinion of the court.

The statute creating the office.

The office of general appraiser of merchandise was created by the twelfth section of the act of Congress approved June 10, 1890. The material portion of that section reads as follows:

> SEC. 12. That there shall be appointed by the President by and with the advice and consent of the Senate, nine general appraisers of merchandise. . . . They shall not be engaged in any other business, avocation or employment, and may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office.

Has the President a general unrestricted power to remove?

There is of course no doubt of the power of Congress to create such an office as is provided for in the above section. Under the provision that the officer might be removed from office at any time for inefficiency, neglect of duty, or malfeasance in office, we are of opinion that if the removal is sought to be made for those causes, or either of them, the officer is entitled to notice and a hearing, Reagan *v.* United States, 182 U. S. 419, 425. It must be presumed that the President did not make the removal for any cause assigned in the statute, because there was given to the officer no notice or opportunity to defend. The question then arises, can the President exercise the power of removal for any other causes than those mentioned in the statute; in other words, is he restricted to a removal for those causes alone, or can he exercise his general power of removal without such restriction?

The enumeration of certain causes does not restrict the general power.

The appellant contends that because the statute specified certain causes for which the officer might be removed, it thereby impliedly excluded and denied the right to remove for any other cause, and that the President was therefore by the statute pro-

hibited from any removal except for the causes, or some of them, therein defined. The maxim, *expressio unius est exclusio alterius*, is used as an illustration of the principle upon which the contention is founded. We are of opinion that as thus used the maxim does not justify the contention of the appellant. We regard it as inapplicable to the facts herein. The right of removal would exist if the statute had not contained a word upon that subject. It does not exist by virtue of the grant, but it inheres in the right to appoint, unless limited by the Constitution or statute. It requires plain language to take it away. Did Congress by the use of language providing for removal for certain causes thereby provide that the right could only be exercised in the specific causes? If so, see what a difference in the tenure of office is effected as to this office, from that existing generally in this country. The tenure of the judicial officers of the United States is provided for by the Constitution but with that exception no civil officer has ever held office by a life tenure since the foundation of the government.

The uniform practice in cases of removal.

To construe the statute as contended for by the appellant is to give an appraiser of merchandise the right to hold that office during his life or until he shall be found guilty of some act specified in the statute. If this be true, a complete revolution in the general tenure of office is effected, by implication, with regard to this particular office. We think it quite inadmissible to attribute an intention on the part of Congress to make such an extraordinary change in the usual rule governing the tenure of office and one which is to be applied to this particular office only, without stating such intention in plain and explicit language, instead of leaving it to be implied from doubtful inferences. We can see no reason for such action by Congress with reference to this office or the duties connected with it.

The President presumed to act constitutionally.

In making removals from office it must be assumed that the President acts with reference to his constitutional duty to take care that the laws are faithfully executed, and we think it would be a mistaken view to hold that mere specification in the statute of some causes of removal thereby excluded the right of the President

to remove for any other reason which he, acting with a due sense of his official responsibility, should think sufficient. It is true that, under this construction, it is possible that officers may be removed for causes unconnected with the proper administration of the office. That is the case with most of the other officers in the government. The only restraint in cases such as this must consist in the responsibility of the President under his oath of office, to so act as shall be for the general benefit and welfare.

80. *The Executive Departments and Congress* *

Whatever may be the theory about the separation of powers and the independence of the executive, it remains a fact that the executive departments and their principal officers "are the creatures of the laws of Congress, exercising only such powers and performing only such duties as those laws prescribe." [1] The relation of the departments to Congress is thus described by Senator Spooner in a speech delivered in the Senate.

The peculiar position of the State Department.

I agree entirely with what the Senator from Colorado says: "That we are in the habit of passing resolutions directing the heads of all the departments except — that is my own qualification — except the State Department — the Secretary of State — to answer interrogatories and to send to the Senate information indicated in such resolutions." Often I have, where a resolution was in the form "requested," suggested that the word "requested" be stricken out and that the word "directed" be substituted, but I have not known an instance since I have been a member of the Senate in which the Senate has directed the Secretary of State to forward to the Senate copies of diplomatic correspondence, instructions to ministers or to agents appointed by the President to negotiate treaties. It has always been, so far as my memory goes, in form a "request" to the President to transmit, if not, in his judgment, incompatible with the public interest. And there is a reason, Mr. President, for this distinction in the form of directing the Department of State and other Departments. No one will

[1] See above, p. 178.

dispute for a moment that the conduct of our foreign affairs is, under the Constitution, entirely in the hands and under the control, of the President, and there never has been written a book on the Constitution — Story, Rawle, Kent, Pomeroy — any book upon the subject which has not emphasized the fact, which is apparent to thoughtful men, that the conduct of our foreign relations, instructions by the President to ministers and other diplomatic agents, require and involve in the interests of the country, more or less of secrecy.

Distinctio between t Departme of State and other Departme

The other Departments of the Government perform very many duties imposed primarily by Congress, dealing entirely with our domestic affairs, and therefore the distinction which, as I understand, has always been observed, and which I think ought to be observed, between the other Departments of the Government and the Department of State, so far as it relates to instructions given to and correspondence with diplomatic agents of the United States, ambassadors, ministers, and senators.

Congress defines th duties of Cabinet officers.

The Cabinet is not the mere retinue of the President; the Cabinet taken as a body is not merely the official family of the President. We impose duties every day during the session of Congress by law upon the Cabinet officers which it is beyond the power of the President by any instruction of his to pretermit obedience to. The Constitution recognizes Cabinet officers. It deals with them or characterizes them as "Heads of Departments." It authorizes us — and when I say us I mean Congress — to vest in them the appointment of inferior officers; and in the discharge of that function they are as independent of the order or control of the President, theoretically at least, as if they were entirely independent of the President in other respects. The statute books are full of duties imposed and orders made by the Congress to be executed by this member of the Cabinet, or that member, or the other. But I draw the line only as to the Secretary of State, so far as his functions relate to diplomatic correspondence and to that domain of duty in which he acts under the Constitution, and can act under the Constitution only by order of the President, and cannot act by order of the Congress.

81. *The Power of Administrative Officials to Decide Cases Affecting Life, Liberty, and Property**

It is a theory of our constitutional law that the courts are the proper resort of citizens or persons claiming that their rights have been infringed by public officers. However, with the multiplication of official duties connected with immigration, commerce, and taxation, it was found necessary to give to administrative, *i.e.*, nonjudicial officers, large powers in deciding finally cases affecting the rights of persons. The question was speedily raised whether administrative officials could constitutionally exercise semi-judicial functions, and the Supreme Court answered it in the affirmative, in the following case, holding that due process of law does not require *judicial* trial.[1]

The statement of the problem.

In a *habeas corpus* proceeding in a District Court of the United States instituted in behalf of a person of Chinese descent being held for return to China by the steamship company which recently brought him therefrom to a port of the United States and who applied for admission therein on the ground that he was a native born citizen thereof but who, after a hearing, the lawfully designated immigration officers found not born therein and to whom they denied admission, — which finding and denial, upon appeal to the Secretary of Commerce and Labor was affirmed — should the court treat the finding and the action of such executive officers upon the question of citizenship and other questions of fact as having been made by a tribunal authorized to decide the same and as final and conclusive unless it be made affirmatively to appear that such officers, in the case submitted to them, abused the discretion vested in them or in some other way in hearing and determining the same committed prejudicial error? The broad question is presented whether or not the decision of the Secretary of Commerce and Labor is conclusive.

Principles laid down in other cases.

In the Japanese Immigrant Case (Yamataya *v.* Fisher), 189 U. S., 86, 97, it was said: "That Congress may exclude aliens of

[1] For an excellent article on the subject, see *The Political Science Review*, Vol. I, 583 ff., an article by Thomas Reed Powell.

a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of the law; and commit the enforcement of such provisions, conditions, and regulations exclusively to executive officers without judicial intervention, are principles firmly established by the decisions of this court." In Fok Young Yo *v.* United States, 185 U. S., 296, 304, 305, it was held that the decision of the collector of customs on the right of transit across the territory of the United States was conclusive, and, still more to the point, in Lem Moon Sing *v.* United States, 158 U. S., 538, where the petitioner for *habeas corpus* alleged facts which, if true, gave him a right to enter and remain in the country, it was held that a decision of the collector was final as to whether or not he belonged to the privileged class.

Due pro of law d not requ judicial

In view of the cases which we have cited it seems no longer open to discuss the question propounded as a new one. Therefore we do not analyze the nature of the right of a person presenting himself at the frontier for admission. But it is not improper to add a few words. The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate. If, for the purpose of argument, we assume that the Fifth amendment [1] applies to him and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of the opinion that with regard to him due process of law does not require a judicial trial. That is the result of the cases which we have cited and the almost necessary result of the power of Congress to pass exclusion laws. That the decision may be entrusted to an executive officer and that his decision is due process of law was affirmed and explained in Hishimura Ekiu *v.* United States, 142 U. S., 651, 660.

[1] See above, p. 137.

82. *The Fraud Orders of the Post-office Department**

Another example of the way in which private rights are subjected to administrative discretion without relief by judicial process is afforded by the right of the Postmaster-General to exclude summarily from the mails anything that he may deem fraudulent. The following attack made in Congress on this practice indicates the dangers of carrying the powers of administrative officials too far.

he effect a fraud der.

The Supreme Court has held that the fraud-order power may be conferred upon the Postmaster-General because the right to the mail is a privilege and not a vested right, and that the proceeding is not criminal in its character. While this may be the correct constitutional theory, yet the party against whom a fraud-order is issued is branded as a criminal and stigmatized as a perpetrator of fraud. It makes him an outlaw as far as one of the most important branches of the Government is concerned. The issuance of such an order covers all his mail and deprives him of the right to communicate with his friends, his wife, or his mother, or to receive any communication from them by means of the mails.

ature of st-office quiries.

All of this is done upon confidential reports, the result of secret investigations based upon *ex parte* statements of persons whose motives cannot be known, who may be responsible or who may be irresponsible, who may not be competent witnesses, and who are not sworn and do not carry the responsibilities of ordinary witnesses. Their names and identity are not disclosed, and their evidence does not contain one single safeguard against fraud or one single test of credibility. Such evidence would not be received in the humblest magistrate's court of the country in a case involving the investigation of the most inconsequential right of person or property.

he great tent of e fraud- der siness.

The investigation and decision of fraud-order cases under the practice in the Department is necessarily made by the Assistant Attorney-General. During the two years ending June 30 last, 660 fraud orders were issued and a number of cases investigated

where the accused agreed to modify his advertising matter so that it would conform to the ideas of propriety of the Assistant Attorney-General, thereby obviating the issuing of an order excluding him from the mails. Over one case a day had to be examined and decided, and it would be out of the question for the Postmaster-General to give his personal attention to the examination and decision of these cases and attend to the other arduous and multifarious duties of his office. The Assistant Attorney-General devotes the bulk of his time to the fraud-order business. He refers complaints to post-office inspectors, examines reports, decides questions of law and fact, hears matter in defense, and practically has the decision of the ultimate question as to whether a fraud order shall be issued or not, although the work is done in the name of the Postmaster-General. . . .

I have no sympathy with or respect for the policy that affects the important rights of person, reputation, or property by means of confidential reports of secret emissaries of the law. Reports containing evidence respecting the rights of the citizen should always be made public. No consideration of delicacy or embarrassment should justify the Government in blasting the reputation and ruining the business of a citizen without giving him an opportunity to know exactly who has testified against him and to what he has testified. The reports of inspectors under any practice should be open to the person who may be affected by the fraud-order. He should be allowed to know who have given information or testified against him, and citizens who are interviewed should understand that their names and statements would be open to inspection by the person against whom they testify or give information. This would have a most wholesome and salutary influence. Men would see that the statements that were written up by the post-office inspectors and credited to them were fair and just and absolutely true. There should be no inducement or opportunity for men to attempt to stab the business or reputation of rivals in the dark.

The
is en
hear
evide
again

83. *The "Spoils System" in National Administration*

It was early discovered that federal offices could be used to reward friends and punish enemies without regard to administrative efficiency, and this practice steadily developed until, in Andrew Jackson's day, it became an open and avowed rule of politics. The pass to which the unhampered spoils system brought the national administration is described in the following report to the Senate in 1882.

The growth of our country from 350,000 square miles to 4,000,000, the increase of population from 3,000,000 to 50,000,000, the addition of twenty-five States, imperial in size and capabilities, have caused a corresponding development of the machinery and faculties of the government. In the beginning — even so late as 1801 — there were 906 post-offices; now there are 44,848. Then there were 69 custom-houses; now there are 135. Then the revenues were less than $3,000,000; now they are $400,000,000. Then our ministers to foreign countries were 4; now they are 33. Then our consuls were 63; now they are 728. Then less than 1,000 men sufficed to administer the government; now more than 100,000 are needed. Then one man might personally know, appoint on their merits, supervise the performance of their duties, and for sufficient cause remove all officers; now, no single human being, however great his intelligence, discrimination, industry, endurance, devotion, even if relieved of every other duty, can possibly, unaided, select and retain in official station those best fitted to discharge the many and varied and delicate functions of the government.

It has come to pass that the work of paying political debts and discharging political obligations, of rewarding personal friends and punishing personal foes, is the first to confront each President on assuming the duties of his office, and is ever present with him even to the last moment of his official term, giving him no rest and little time for the transaction of other business, or for the study of any higher or grander problems of statesmanship. He is compelled to give daily audience to those who personally seek place, or to the army of those who back them. He is to do what some

predecessor of his has left undone, or to undo what others before him have done; to put this man up and that man down, as the system of political rewards and punishments shall seem to him to demand. Instead of the study of great questions of statesmanship, of broad and comprehensive administrative policy, either as it may concern this particular country at home, or the relations of this great nation to the other nations of the earth, he must devote himself to the petty business of weighing in the balance the political considerations that shall determine the claim of this friend or that political supporter to the possession of some office of profit or honor under him.

The perversion of the President's office.

The office of Chief Magistrate has undergone in practice a radical change. The President of the Republic created by the Constitution in the beginning, and the Chief Magistrate of to-day, are two entirely different public functionaries. There has grown up such a perversion of the duties of that high office, such a prostitution of it to ends unworthy the great idea of its creation, imposing burdens so grievous, and so degrading of all the faculties and functions becoming its occupant, that a change has already come in the character of the government itself, which, if not corrected, will be permanent and disastrous. Thus hampered and beset, the Chief Magistrate of this nation wears out his term and his life in the petty services of party, and in the bestowal of the favors its ascendency commands. He gives daily audience to beggars for place, and sits in judgment upon the party claims of contestants.

The nation humiliated by office seekers.

The Executive Mansion is besieged, if not sacked, and its corridors and chambers are crowded each day with the ever-changing, but never-ending throng. Every Chief Magistrate, since the evil has grown to its present proportions, has cried out for deliverance. Physical endurance, even, is taxed beyond its power. More than one President is believed to have lost his life from this cause. The spectacle exhibited of the Chief Magistrate of this great nation, feeding, like a keeper, his flock, the hungry, clamorous, crowding, jostling multitude which daily gathers around the dispenser of patronage, is humiliating to the patriotic citizen interested alone

in national progress and grandeur. Each President, whatever may be his political associations, however strong may be his personal characteristics, steps into a current, the force of which is constantly increasing. He can neither stem nor control it, much less direct his own course, as he is buffeted and driven hither and thither by its uncertain and unmanageable forces.

ongress-
en be-
iged by
ace-
inters.

The malign influence of political domination in appointments to office is wide-spread, and reaches out from the President himself to all possible means of approach to the appointing power. It poisons the very air we breathe. No Congressman in accord with the dispenser of power can wholly escape it. It is ever present. When he awakes in the morning it is at his door, and when he retires at night it haunts his chamber. It goes before him, it follows after him, and it meets him on the way. It levies contributions on all the relationships of a Congressman's life, summons kinship and friendship and interest to its aid, and imposes upon him a work which is never finished and from which there is no release. Time is consumed, strength is exhausted, the mind is absorbed, and the vital forces of the legislator, mental, as well as physical, are spent in the never-ending struggle for offices.

84. *The Civil Service Act*

In order to remove a large number of routine and subordinate offices from the baneful influence of partisanship, Congress passed in 1883 an act authorizing the establishment of a system of examinations testing the fitness of candidates for certain classes of government positions. The clauses showing the general purpose of the act are given here: —

ıe Civil
rvice
ɔmmission.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President is authorized to appoint, by and with the advice and consent of the Senate, three persons, not more than two of whom shall be adherents of the same party, as Civil Service Commissioners, and said three Commissioners shall constitute the United States Civil Service Commission. Said Commissioners shall hold no other

official place under the United States. The President may remove any Commissioner; and any vacancy in the position of Commissioner shall be so filled by the President, by and with the advice and consent of the Senate, as to conform to said conditions for the first selection of Commissioners. The Commissioners shall each receive a salary of three thousand five hundred dollars a year. And each of said Commissioners shall be paid his necessary traveling expenses incurred in the discharge of his duty as a Commissioner.

SEC. 2. That it shall be the duty of said Commissioners:

Duties of the Commissio

First. To aid the President, as he may request, in preparing suitable rules for carrying this act into effect, and when said rules shall have been promulgated it shall be the duty of all officers of the United States in the departments and offices to which any such rules may relate to aid, in all proper ways, in carrying said rules, and any modifications thereof, into effect.

Second. And, among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:

First, for open, competitive examinations for testing the fitness of applicants for the public service now classified or to be classified hereunder. Such examinations shall be practical in their character, and so far as may be shall relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed.

Second, that all the offices, places, and employments so arranged or to be arranged in classes shall be filled by selections according to grade from among those graded highest as the results of such competitive examinations.

Third, appointments to the public service aforesaid in the departments at Washington shall be apportioned among the several States and Territories and the District of Columbia upon the basis of population as ascertained at the last preceding census. Every application for an examination shall contain, among other things,

a statement, under oath, setting forth his or her actual bona fide residence at the time of making the application, as well as how long he or she has been a resident of such place.

Fourth, that there shall be a period of probation before any absolute appointment or employment aforesaid.

Fifth, that no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so.

Sixth, that no person in said service has any right to use his official authority or influence to coerce the political action of any person or body.

Seventh, there shall be noncompetitive examinations in all proper cases before the Commission, when competent persons do not compete, after notice has been given of the existence of the vacancy, under such rules as may be prescribed by the Commissioners as to the manner of giving notice.

Eighth, that notice shall be given in writing by the appointing power to said Commission of the persons selected for appointment or employment from among those who have been examined, of the place of residence of such persons, of the rejection of any such persons after probation, of transfers, resignations, and removals, and of the date thereof, and a record of the same shall be kept by said Commission.

And any necessary exceptions from said eight fundamental provisions of the rules shall be set forth in connection with such rules, and the reasons therefor shall be stated in the annual reports of the Commission.

Third. Said Commission shall, subject to the rules that may be made by the President, make regulations for, and have control of, such examinations, and, through its members or the examiners, it shall supervise and preserve the records of the same; and said Commission shall keep minutes of its own proceedings.

Fourth. Said Commission may make investigations concerning the facts, and may report upon all matters touching the enforce-

ment and effects of said rules and regulations, and concerning the action of any examiner or board of examiners hereinafter provided for, and its own subordinates, and those in the public service, in respect to the execution of this act.

Fifth. Said Commission shall make an annual report to the President for transmission to Congress, showing its own action, the rules and regulations and the exceptions thereto in force, the practical effects thereof, and any suggestions it may approve for the more effectual accomplishment of the purposes of this act.

85. *President Cleveland and the Place Hunters*

Notwithstanding the removal of a large number of offices from the operations of the spoils system, enough political appointments remained to harass the President. Mr. Cleveland shortly after taking office in 1893 issued the following plea for help.

EXECUTIVE MANSION, May 8, 1893.

The limi of endur ance reac

It has become apparent after two months' experience that the rules heretofore promulgated regulating interviews with the President have wholly failed in their operation. The time which under these rules was set apart for the reception of Senators and Representatives has been almost entirely spent in listening to applications for office, which have been bewildering in volume, perplexing and exhausting in their iteration, and impossible of remembrance. A due regard for public duty, which must be neglected if present conditions continue, and an observance of the limitations placed upon human endurance oblige me to decline from and after this date all personal interviews with those seeking appointments to office, except as I on my own motion may especially invite them. The same considerations make it impossible for me to receive those who merely desire to pay their respects except on the days and during the hours especially designated for that purpose.

I earnestly request Senators and Representatives to aid me in securing for them uninterrupted interviews by declining to introduce their constituents and friends when visiting the Executive

Mansion during the hours designated for their reception. Applicants for office will only prejudice their prospects by repeated importunity and by remaining in Washington to await results.

GROVER CLEVELAND.

86. *Senatorial Courtesy*

The President is authorized, under the Constitution, to nominate and, by and with the advice and consent of the Senate, to appoint certain federal officers, but he has by no means a free hand in selecting candidates to propose to the Senate. By a practice known as "senatorial courtesy" the senators from each state who belong to the President's party have the right to select the important local federal officers, and their fellow-senators as a rule will confirm only nominees so selected. An instance of the application of this rule is thus given by Mr. Boutwell in his *Reminiscences:* —

One of my last acts as Secretary was to advise the President to nominate a Mr. Hitchcock for collector of the port of San Diego, California. Hitchcock was a lawyer by profession, a graduate of Harvard and a man of good standing in San Diego. Mr. Houghton, the member for the San Diego district, had recommended a man who was a saloon-keeper and a Democrat in politics, but he had supported Houghton in the canvass. Houghton's request was supported by Senator Sargent. Upon the facts as then understood the President nominated Hitchcock and one of the first questions of interest to me was the action of the Senate upon the nomination of Hitchcock which I supported. Sargent appealed to what was known as the courtesy of the Senate, a rule or custom which required Senators of the same party to follow the lead of Senators in the matter of nominations from the respective States. To this rule I objected. I refused to recognize it, and I said I would never appeal to the "courtesy" of the Senate in any matter concerning the State of Massachusetts. Hitchcock was rejected. The President nominated Houghton's candidate.

87. *Congressmen and Federal Offices*

There are also a large number of minor federal officers who are appointed principally for political considerations, and the distribution of these offices is intrusted to the Representatives of the respective districts in which they are located. The following letter from Mr. Lincoln illustrates the character of a burdensome task which still falls upon Representatives in Congress.

WASHINGTON, March 10, 1849.

Hon. Secretary of State.

SIR: There are several applicants for the office of United States Marshal for the District of Illinois, among the most prominent of whom are Benjamin Bond, Esq., of Carlyle, and —— Thomas, Esq., of Galena. Mr. Bond I know to be personally every way worthy of the office; and he is very numerously and most respectably recommended. His papers I send to you; and I solicit for his claims a full and fair consideration.

Having said this much, I add that in my individual judgment the appointment of Mr. Thomas would be the better.

Your obedient servant,

A. LINCOLN.

CHAPTER XII

THE CONGRESS OF THE UNITED STATES

88. *Provisions of the Federal Constitution Relative to the Organization of Congress*

amble

WE, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

SECTION I. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.

e use of presenta- s.

SECTION II. 1. The House of Representatives shall be composed of members chosen every second year by the people of the several States; and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.

2. No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

3. Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians

not taxed, three-fifths of all other persons.[1] The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each State shall have at least one representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

4. When vacancies happen in the representations from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

5. The House of Representatives shall choose their speaker and other officers, and shall have the sole power of impeachment.

SECTION III. 1. The Senate of the United States shall be composed of two senators from each State, chosen by the Legislature thereof for six years, and each Senator shall have one vote. The Senat

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided, as equally as may be, into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen, by resignation or otherwise, during the recess of the Legislature of any State, the executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies.

3. No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

[1] See Amendments XIII–XV below, pp. 392–394.

4. The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

5. The Senate shall choose their officers, and also a president *pro tempore*, in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

7 Judgment in case of impeachment shall not extend farther than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law.

oth ouses.

SECTION IV. 1. The times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the place of choosing senators.

2. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

he ouses parately.

SECTION V. 1. Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each house may provide.

2. Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

3. Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the mem-

bers of either house, on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

4. Neither house during the session of Congress shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

Disabilities of members

SECTION VI. 1. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony, breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to or returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

2. No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

Mode of passing

SECTION VII. 1. All bills for raising revenues shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills.

2. Every bill which shall have passed the House of Representatives and the Senate shall, before it become a law, be presented to the President of the United States; if he approve, he shall sign it; but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill

shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

3. Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

89. *The Apportionment of Representatives among the States*

After every census, Congress determines upon the number of Representatives to be allotted to the House of Representatives and apportions them among the states in the following form. It will be noted that by Section 3 of the act Congress has gone further than the letter of the Constitution authorizes and prescribed the general character of each congressional district.[1]

An Act making the apportionment of Representatives in Congress among the several States under the Twelfth Census.

The apportionment of members.

Be it enacted . . . That after the third day of March, nineteen hundred and three, the House of Representatives shall be composed of three hundred and eighty-six members to be apportioned among the several States as follows:

Alabama 9; Arkansas 7; California 8; Colorado 3; [etc., etc.].

SEC. 2. That whenever a new State is admitted to the Union the Representative or Representatives assigned to it shall be in addition to the number three hundred and eighty-six.

Congressional districts.

SEC. 3. That in each State . . . the number to which such State may be entitled in the Fifty-eighth and each subsequent

[1] On this point see Burgess, *Political Science and Constitutional Law*, II, 48 *sq.*

Congress shall be elected by districts composed of contiguous and compact territory containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State shall be entitled in Congress, no one district electing more than one Representative.

Members at large.

SEC. 4. That in case of an increase in the number of Representatives which may be given any State under this apportionment, such additional Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law until the legislature of such State in the manner herein prescribed shall redistrict such State; . . . and if the number hereby provided for shall in any State be less than it was before . . . then the whole number . . . shall be elected at large unless the legislatures of said States have provided or shall otherwise provide before the time fixed by law for the next election of Representatives therein.

90. *The Art of Gerrymandering*

Subject to the rule regarding "contiguous territory," the legislature of each state may construct congressional districts after its own fashion. As a matter of general practice the political party that happens to be in power in the state, when the decennial apportionment comes around, so arranges the districts as to secure the largest possible number of Representatives at the ensuing elections. Sometimes by careful calculation a legislature may enable a minority of the voters to return a majority of Representatives for the whole state. This is the art of gerrymandering. It is described in an interesting manner in a speech made by Mr. McKinley criticising the action of the Democratic party in Ohio in undoing a reapportionment made by the Republicans.

The practice of letting the apportionment stand for the decennial period.

The act of the Legislature in reapportioning the counties into Congressional districts, at an irregular period, is without precedent in Ohio since the organization of the Republican party and without example under the present Constitution. For thirty-three years the unbroken rule has been to form such districts after each Federal census, and at the end of every ten years, such political subdivisions

to remain unchanged until the next census. This secures a representation based upon the actual number of inhabitants disclosed at each census, according to the ratio of representation fixed by the Congress of the United States. No innovation has been made upon this rule since 1845 and then but a partial one. Parties have changed in numerical strength within that period, political supremacy has alternated from one to the other of the great parties, partisan hate has been intense and bitter, party necessities have been great and overshadowing. The majority force has existed many times before, in both political parties, but no Ohio Legislature from 1845 to 1878 was found so reckless of principle and precedent as to destroy these political subdivisions between the decennial periods.

This action alone, it seems to me, is sufficient, when rightly understood, to react upon its authors and secure for them a crushing defeat. It can not be too frequently brought to the attention of the people, nor too severely denounced. It works a vital disfranchisement of a large body of Republicans under color of law by a shameful abuse of power and in violation of the spirit of the Constitution of the State and of the United States.

How the gerrymander operates.

Under the new law, taking the vote of 1876 as a basis, when the Republicans carried the State by over 6,000, the Democrats will have twelve Congressmen and the Republicans eight. The redistricting was not in the interest of fairness, but to increase Democratic representation, in violation of every principle of fairness. It was not the work of the masses of the Democratic party in the State; it was not the creation of the better class of our political opponents; it met with opposition from the order-loving and law-abiding citizens alike of both parties. It was ordered by designing politicians at Washington, to secure power in the next House, right or wrong; and the Ohio Legislature, which had before always stood with a "face of flint" against every species of revolution, yielded, basely yielded, principle and justice for purely party ends. . . .

91. *The Law Governing the Election of Senators*

The Constitution states that the two Senators from each commonwealth shall be elected by the legislature thereof, and authorizes Congress to make regulations regarding the time and manner of the election. For more than half a century the states were left to their several devices, but in 1866 Congress passed this statute prescribing the precise method to be followed in each case: —

Time of election.

SEC. 14. The legislature of each State which is chosen next preceding the expiration of the time for which any Senator was elected to represent such State in Congress shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress.

Mode of election.

SEC. 15. Such election shall be conducted in the following manner: Each house shall openly, by a viva-voce vote of each member present, name one person for Senator in Congress from such State, and the name of the person so voted for, who receives a majority of the whole number of votes cast in each house, shall be entered on the journal of that house by the clerk or secretary thereof; or if either house fails to give such majority to any person on that day, the fact shall be entered on the journal. At twelve o'clock meridian of the day following that on which proceedings are required to take place as aforesaid, the members of the two houses shall convene in joint assembly, and the journal of each house shall then be read, and if the same person has received a majority of all the votes in each house, he shall be declared duly elected Senator.

But if the same person has not received a majority of the votes in each house, or if either house has failed to take proceedings as required by this section, the joint assembly shall then proceed to choose, by a viva-voce vote of each member present, a person for Senator, and the person who receives a majority of all the votes of the joint assembly, a majority of all the members elected to both houses being present and voting, shall be declared duly elected. If no person receives such majority on the first day, the joint assembly

shall meet at twelve o'clock meridian of each succeeding day during the session of the legislature, and shall take at least one vote, until a Senator is elected.

Vacancies.

SEC. 16. Whenever on the meeting of the legislature of any State a vacancy exists in the representation of such State in the Senate, the legislature shall proceed, on the second Tuesday after meeting and organization, to elect a person to fill such vacancy, in the manner prescribed in the preceding section for the election of a Senator for a full term.

SEC. 17. Whenever during a session of the legislature of any State a vacancy occurs in the representation of such State in the Senate, similar proceedings to fill such vacancy shall be had on the second Tuesday after the legislature has organized and has notice of such vacancy.

Certificate of election.

SEC. 18. It shall be the duty of the executive of the State from which any Senator has been chosen, to certify his election, under the seal of the State, to the President of the Senate of the United States.

SEC. 19. The certificate mentioned in the preceding section shall be countersigned by the secretary of state of the State.

92. *The Original Purpose of the Senate**

Now that the Senate has been subjected to rather severe criticisms in many quarters,[1] and attempts to alter its character have been made in many states by the establishment of popular election, it seems well to inquire into the original position which the framers intended to give the Senate in our political system. These passages are from *The Federalist.*

The Senate a check on the lower House.

. . . Second. The necessity of a senate is not less indicated by the propensity of all single and numerous assemblies, to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions. Examples on this subject might be cited without number; and from proceedings within the United States, as well as from the

[1] Reinsch, *American Legislatures and Legislative Methods*, pp. 79 *sqq.*

history of other nations. But a position that will not be contradicted, need not be proved. All that need be remarked, is, that a body which is to correct this infirmity, ought itself to be free from it, and consequently ought to hold its authority by a tenure of considerable duration.

The long term gives the Senate experience

Third. Another defect to be supplied by a senate, lies in a want of due acquaintance with the objects and principles of legislation. It is not possible that an assembly of men, called for the most part, from pursuits of a private nature, continued in appointment for a short time, and led by no permanent motive to devote the intervals of public occupation to a study of the laws, the affairs, and the comprehensive interests of their country, should, if left wholly to themselves, escape a variety of important errors in the exercise of their legislative trust. It may be affirmed, on the best grounds, that no small share of the present embarrassments of America is to be charged on the blunders of our governments; and that these have proceeded from the heads, rather than the hearts of most of the authors of them. What indeed are all the repealing, explaining, and amending laws, which fill and disgrace our voluminous codes, but so many monuments of deficient wisdom; so many impeachments exhibited by each succeeding, against each preceding, session; so many admonitions to the people, of the value of those aids, which may be expected from a well constituted senate?

Frequent elections lead to rapid changes.

Fourth. The mutability in the public councils, arising from a rapid succession of new members, however qualified they may be, points out, in the strongest manner, the necessity of some stable institution in the government. Every new election in the states, is found to change one half of the representatives. From this change of men must proceed a change of opinions; and from a change of opinions, a change of measures. But a continual change even of good measures is inconsistent with every rule of prudence, and every prospect of success. The remark is verified in private life, and becomes more just as well as more important, in national transactions.

A fifth desideratum, illustrating the utility of a senate, is the want of a due sense of national character. Without a select and stable member of the government, the esteem of foreign powers will not only be forfeited by an unenlightened and variable policy, proceeding from the causes already mentioned; but the national councils will not possess that sensibility to the opinion of the world, which is perhaps not less necessary in order to merit, than it is to obtain, its respect and confidence. Yet however requisite a sense of national character may be, it is evident that it can never be sufficiently possessed by a numerous and changeable body. It can only be found in a number so small, that a sensible degree of the praise and blame of public measures, may be the portion of each individual; or in an assembly so durably invested with public trust, that the pride and consequence of its members may be sensibly incorporated with the reputation and prosperity of the community.

The objects of government may be divided into two general classes; the one depending on measures, which have singly an immediate and sensible operation; the other depending on a succession of well chosen and well connected measures, which have a gradual and perhaps unobserved operation. The importance of the latter description to the collective and permanent welfare of every country, needs no explanation. And yet it is evident that an assembly elected for so short a term as to be unable to provide more than one or two links in a chain of measures, on which the general welfare may essentially depend, ought not to be answerable for the final result, any more than a steward or tenant, engaged for one year, could justly be made to answer for plans or improvements, which could not be accomplished in less than half a dozen years. Nor is it possible for the people to estimate the share of influence, which their annual assemblies may respectively have on events resulting from the mixed transactions of several years. It is sufficiently difficult, at any rate, to preserve a personal responsibility in the members of a numerous body, for such acts of the body as have an immediate, detached, and palpable operation on its constituents. . . .

93. *Popular Election of Senators in Oregon*

The law of Oregon makes the following provisions for the nomination and election of United States Senators by popular vote. It will be noted, however, that the federal Constitution provides that the state legislature shall elect; and, to secure the legislative approval of the popular choice, Oregon has adopted the plan of permitting the candidates for the state legislature to pledge themselves in advance to vote for the candidate for United States Senator receiving the highest popular vote. As most of them accept this pledge the legislature is morally bound to confirm the popular choice.

Nomin of part candid

At all general primary nominating elections next preceding the election of a senator in Congress by the legislature of Oregon there shall be placed upon the official primary nominating election ballots, by each of the county clerks and clerks of the county court, the names of all candidates for the office of senator in Congress, for whose nominations petitions have been duly made and filed under the provisions of this law, the votes for which candidates shall be counted and certified to by the election judges and clerks in the same manner as the votes for other candidates; and records of the vote for such candidates shall be made out and sworn to by the board of canvassers of each county of the State and returned to the Secretary of State at the same time and in like manner as they shall transmit other records and returns required by this law.

Popula on the candid

At all general elections next preceding the election of a senator in Congress by the legislature of Oregon there shall be placed upon the official ballot by each of the county clerks and clerks of the county court the names of all candidates for the office of senator in Congress that have been nominated in any of the methods now, or which may hereafter be, provided by law for the nomination of state officers of the State of Oregon; the votes for which candidates shall be counted and certified to by the election judges in the same manner as the votes for other candidates; and records of the vote for such candidates shall be made out and sworn to by the board of canvassers of each county of the State and returned to the

Secretary of State, who shall transmit duplicate copies of such returns to the legislative assembly at its next ensuing session, one of which shall be addressed to the senate and the other to the house of representatives of the State of Oregon, one copy of which shall be delivered by him to the president of the senate and the other to the speaker of the house of representatives, after the organization of such bodies, which officers shall open and lay the same before the separate houses when assembled to elect a senator in Congress as now required by law of Congress; and it shall be the duty of each house to count the votes and announce the candidate for senator having the highest number, and thereupon the house shall proceed to the election of a senator as required by the act of Congress and the constitution of this State.

94. *The Question of Popular Election of Senators* *

Senator Turpie, in the course of a speech made in the Senate on March 23, 1897, made the following arguments in support of popular election.

How senatorial politics disturbs state legislatures.

There is certainly a very clear incongruity between legislative duties and the office of choosing Senators of the United States. This disagreement has become greater as the country has grown older. It is not now uncommon that the legislature of a State spends the whole time of its session in the effort to elect a United States Senator, and adjourns without succeeding in the attempt. This results in the total neglect by the members of the general assembly of their functions as lawgivers of the State. Thus the rights and interests local to the people of the State are submerged, overwhelmed, and forgotten in the struggle over the Senatorial election. Besides this, the condition of political parties becomes sometimes so evenly balanced as that a very small number — two or three members of the legislature belonging to some middle or third party in a small minority among the people — is able to determine the choice of Senator, or to prevent one being made. The inability to elect by the legislative body is becoming more and

more frequent. It is not a physical disability; it is rather a political or functional inability induced by the too close equilibrium of dissenting forces which are unable to unite upon a choice.

"Deadlocks" in senatorial elections.

It is true, as has already been noted, that the Federal Constitution provides that no State shall be deprived of its equal suffrage in the Senate, but the fact is that under the present mode of choosing United States Senators by the legislatures many of the States have been, from time to time, deprived of their equal suffrage in the Senate. Washington, Wyoming, and Montana, in the cases of Allen, Beckwith, and Mantle, and Delaware until a quite recent date were so situated, and at this very time the States of Oregon and Kentucky are deprived of their equal representation in the Senate by reason of the inability of the legislatures to elect.

The peculiar case of Oregon.

Take the case of Oregon. It is not singular. There have been many cases of the kind before this — not similar in circumstances, but wholly similar in results. In the case of Oregon the State constitution provides for biennial sessions of the legislature. The legislature met there on the second Tuesday in January. They stayed forty-five days — the whole of the constitutional limit. They did not organize during this entire term. There was no act; there was no resolution; there was no legislative action by either house, and no recognition of the two houses by any department of the State government. When the forty-five days had expired, the persons who had been elected to the general assembly did not adjourn because they had never met. They folded their tents, like the Arabs, and went back, each to his own residence, and constituency.[1] It is a case, sir — and there have been many like it — where the inability of the legislature to elect destroyed, extinguished, the legislative function in a sovereign State. The Senatorial election was a question so dominant and destructive that the choice of Senator prevented even an attempt at organization or normal legislative action. All these evils will disappear by this change in the method of electing Senators. The people at large would not be hindered by any such disability. They would vote for the

[1] This was, of course, before the enactment of the law given above, p. 225.

Senator the same as they do for the governor, and a count of the vote would decide the election.

The people worthy of trust.

The election of Senators by a direct vote of the people of the several States is a reform much needed at this period of our history to bring the whole scheme of government into harmony with its several parts, so that Senators, whether serving at Washington or in the capital of the State, shall be the immediate agents and servants of the people and be personally answerable directly to the people as such. The people in more than a hundred years of our history, in peace and war, in prosperity and adversity, have shown themselves entirely worthy of this trust and confidence.

State legislatures losing their elective functions.

The era of almost exclusive supremacy formerly enjoyed by the legislatures of the States has passed away. The only remnant of it remaining is the election of United States Senators, a method out of accord with the broad and liberal extension of the franchise now everywhere prevalent. The extension of the elective franchise during the last fifty years has been very great, but the exercise of it in choosing the officers of the government in the several States has been yet greater. The number of voters in the States, by the abolition of restrictions on the franchise, has been very much increased, but the number of officers to be voted for has been even more enlarged. In the early days of this Republic, the legislatures of the States chose the whole body of the executive and judicial officers therein, and often selected them from among their own number. Thomas Jefferson was elected governor of Virginia by the legislature of Virginia. He was elected a Member of Congress under the Articles of Confederation by the legislature of Virginia. Even in my own lifetime I recollect being canvassed as a member of the legislature, because the legislature elected circuit judges and the governor and the State senate appointed supreme judges. All this system has vanished. That era has disappeared. These vast delegations of power have melted away in the presence of the people, and this remnant left alone will dissolve also.

Now, in every one of the forty-five States, but with few exceptions, these officers, from the highest to the lowest, are elected by a

direct vote of the people. The pending amendment does not propose so great a change as this, but it does propose that the Congress, in both branches, shall be chosen by the people in the same manner as the senate and house of the legislatures of the States are now chosen. Thus we may perfect the symmetry of our frame of government, and recognize the immediate sovereignty of the people in its legislative department. . . .

The caucus not the legislature elects anyhow.

The legislative caucus, which at the capital of a State usually selects the candidate for a membership of this body, is an assembly peculiarly adapted to the machinations of syndicates and trusts. The whole number of such a conference is small. The number necessary to control its choice is yet smaller. The members of it are persons in the exercise of delegated powers, distant from their constituencies, and most liable to temptation. In such an assembly the intrigue and corruption of the trusts are plants of indigenous growth. All this evil, and what is of almost as much moment, the suspicion of evil, is obliterated; it is swept away by the change which we propose. When each voter of the whole mass of voters in the State is allowed the privilege of personally choosing the Senator, the power of that syndicate, which is always a minority in numbers, is broken. Nor is it any answer to these considerations to assume that a State convention would be as subject to these malignant influences as a legislative caucus; even if this were true, the action of a convention is not final. It must yet abide, under our plan, the scrutiny of a popular vote, while the action of the caucus is final, and may often result in a choice directly adverse to popular rights and interests.

The other side of the question of popular election is thus upheld by Senator Edmunds: —

It is claimed that the Senate is unrepresentative.

The founders of the republic believed that the liberty and happiness of the people of the several States — States which they foresaw would finally embrace a continent in their benign sway — could only be preserved by such divisions and subdivisions of the sources and methods and exercise of political power as they adopted

and provided for. A century of experience has demonstrated the wisdom of their marvellous plan. But a new school of politicians has now appeared who profess to believe that the Fathers were mistaken in their theory of the surest foundation of our national republic, and that the system they adopted has not, in regard to senators, worked well — that the senators have not been the choice of, and have not represented, the great body of the people of the States that elected them and therefore that elections of senators should be had by the suffrage of all the voters in the State *acting together*.

Senators are really representative men.

One test of the truth of the first statement is the fact that of the less than 900 persons who have served as senators since the government was organized in 1789, more than 200 have been members of the House of Representatives — substantially one fourth. Only two States — Montana and Nevada — have not thus been represented, while more than one half of the senators from Massachusetts, Connecticut, Indiana, and Maine, have been members of the House of Representatives; and in addition to these, a very large fraction of the senators have been governors and judges elected by the people in their States. These facts show that it has been almost universally true that those chosen as senators have possessed the confidence, not only of the legislative representatives of political divisions of the States, but of the whole body of the people as well.

Senators not mere agents of the state.

The second part of the assertion of the persons who have seen a new light, as they think, is that sometimes "senators do not represent their States." This is true; but happily for all the States and their people, *a senator, once chosen, becomes a senator of the United States*, and is not a mere agent of the State that chose him. And, as to the State itself that chose him, it has happened, and will happen again, that a gust of passion or a misguided opinion has taken temporary possession of a majority of the people of a particular State which the senator, in his bounden duty to all the States, has disregarded. This was one of the very incidents that the patriots of 1787 foresaw and provided against by legislative elections and a long time of service.

Again, the new school of constitution-makers say that they think the Senate has become a body of rich men who gained their places by corrupting legislatures in a pecuniary way. But to any one acquainted with the personality of the Senate as it has existed for a generation and is now, such a statement is known to be absolutely destitute of foundation. The proportion of rich men in the Senate is not greater than that which exists in every State and community in the whole country where the honors and responsibilities of public office are shared alike by the rich, the comfortable, and the poor. As a perfect millennium has not yet been reached, it is doubtless true that some (but very few) men have secured election as senators by pecuniary persuasions, or, to put it roughly, have "bought their places" with money, — a crime of the worst character both in the buyer and in the seller. But alas, this is not a peculiarity belonging to the office of senator alone. It has happened equally or more often in elections to the House of Representatives, as well as in State and municipal elections. A legislative election of senators, therefore, is not the cause of this great evil. In the nature of things, it must be worse in popular elections, for the members of a legislature must, in the choice of the senator, vote openly, so that the constituents know whether or not their representatives have followed the general judgment of the particular communities they represent, — a matter of vital importance in all representative government. But in popular elections, where each citizen is acting in his personal character only, it is equally important that he have the right to vote secretly, notwithstanding that he may be bribed in spite of every precaution that the law may adopt to prevent it. And when we go back of the regular act of a government election and reach the "primaries" and the district, the county and State conventions, all barriers and safeguards are left behind, and the corruptions of riches and still more of trading machines and office brokerage, have their easiest and most abundant field of achievement in selecting candidates. To cite examples to the intelligent reader would be a waste of time.

The charge of corruption considered

The real people of this republic of States and citizens — those

Arguments for those who believe in order and property.

who believe in liberty and order as inseparable, who believe in the value of individual endeavor and frugality, and, as a consequence, in the right to save earnings and to have homes and houses and lands and schools and churches — should consider: —

First, that the Constitutional provision for the choosing of two senators from each State by its legislature was wisely designed by the States that founded the government, as one of the corner-stones of the structure necessary to secure the rights and safety of the States.

Second, that a legislative instead of a popular election was adopted as necessary to the expression of the deliberate will of the State in its character as such, represented in all its parts in the way in which its own constitution distributed power.

Third, that the people of the several political divisions of the State should have the right to express their choice separately through their legal representatives, as they do in making laws, and not be overwhelmed by a mere weight of numbers that might occupy only a corner of the State and possess interests and cherish ambitions quite unlike those of all the other sections of the commonwealth.

Fourth, that the Senate as it has existed for a century has demonstrated the wisdom of the mode of its constitution.

Fifth, that its members have been as free from any just accusation of corruption, either in their election or in their course as senators, as any equal number of men connected with public affairs on the face of the earth, or connected with all the employments of private life.

Sixth, that as the election of senators by the State legislatures must be by open public voting, the danger of bribery, or the misrepresentation of constituents for other causes, is reduced to a minimum, and stands in strong contrast with the election of senators by the direct vote of the whole mass of voters in the several States, and especially in States where political parties are nearly equal in numbers.

Seventh, that, whatever evils now and then happen under the present system, they do not arise from any fault in the system itself,

but from the fault of the body of citizens themselves, — non-attendance at caucuses and primaries; non-attendance at registration and at the polls; slavish fidelity to party organizations and party names; a contributing to and winking at the corrupt use of money at nominating conventions and elections; and the encouragement or tolerance of individual self-seeking in respect of getting possession of offices, all of which are truly public trusts.

Eighth, that in ninety-five instances out of a hundred, if there be an evil or inadequate senator or other officer in the public service, it is because the power that elected or appointed him — his State or community — has been either grievously negligent or else is fairly represented. We must believe that the people's government is a failure and a delusion, to think otherwise.

Ninth, and finally, there is neither reasonable nor plausible ground then, for taking the grave step of disturbing the exact and solid balance of the powers and functions of our national Constitution, which has in these respects given us a century of security, of State representation, and of State rights, as well as a wonderful national progress as a people.

95. *The Instruction of Representatives in Congress*

It is a principle of our constitutional law that Senators and Representatives are not to be instructed by their constituents,[1] but this principle is constantly violated in practice by state legislatures in passing resolutions similar in form to this resolution adopted by Missouri in 1885.

Joint and concurrent resolution instructing our Senators and requesting our Representatives in Congress to procure legislation authorising receivers of railroad companies appointed by Federal courts to be sued in local State courts, and preserve the right of trial by jury in such suits.

Whereas the circuit courts of the United States, in the exercise of their powers as courts of equity jurisdiction, have, of late,

[1] Burgess, *Political Science and Constitutional Law*, II, p. 50.

adopted the extraordinary practice of taking charge of and for years operating and managing railroads, oftentimes embracing a system of roads hundreds of miles in length and extending into different and distinct States. . . .

Be it resolved by the house of representatives (the senate concurring therein), That our Senators in Congress be instructed and our Representatives requested, to procure such legislation as shall be necessary to secure to all persons the right to sue receivers of railroad companies appointed by Federal courts in places and courts of the States, and to prosecute to judgment, under the same form of law as is provided by State laws for suits against the companies, and for such further legislation therein as will properly regulate and limit the powers of the Federal courts in their equitable interference with and control over railroad companies, so as to preserve to the people their common law and constitutional rights. Approved March 19, 1885.

Henry Clay thus committed himself to the doctrine that representatives were ordinarily bound by instructions from their constituents.

he
nator
ould obey
resign.

What is the basis, and what the principle of the doctrine of instruction? Sir, to a certain extent, I have always believed in this doctrine, and have been ever ready to conform to it. But I hold to the doctrine as it stood in 1789; that, in general, on questions of expediency, the representative should conform to his instructions, and so gratify the wishes, and obey the will, of his constituents, though on questions of constitutionality his course might be different; and, therefore, when the senator last up (Mr. Strange) declared that he would rather submit to a certain operation, than to give his vote declaring that there had been a violation of the Constitution, I felt some alarm, lest the true doctrine of instruction should itself be subverted. And it did not appear to occur to him at the time, that there was another alternative besides obeying, — that is, to resign.

And what is the doctrine of instruction, as it is held by all?

Is it not that we are to conform to the wishes of our constituents? Is it not that we are to act, not in our own, but in a delegated character? And will any who stand here, pretend, that whenever they know the wishes or will of those who sent them here, they are not bound to conform to that will entirely? Is it not the doctrine, that we are nothing more than the mirror to reflect the will of those who called us to our dignified office? That is the view which I take of the doctrine of instruction.

Senators to express thei constituents will.

CHAPTER XIII

THE POWERS OF CONGRESS

96. *Express Powers Conferred upon Congress by the Constitution*

THE Congress shall have power:

Section VIII of the federal Constitution.

1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

2. To borrow money on the credit of the United States;

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

4. To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

5. To coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures;

6. To provide for the punishment of counterfeiting the securities and current coin of the United States;

7. To establish post-offices and post-roads;

8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

9. To constitute tribunals inferior to the Supreme Court;

10. To define and punish felonies committed on the high seas, and offenses against the law of nations;

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

12. To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years;

13. To provide and maintain a navy;

14. To make rules for the government and regulation of land and naval forces;

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

17. To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased, by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; and,

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or office thereof.

97. *The Doctrine of Strict Construction*

The method of reasoning employed by those who would restrict the powers of Congress to the plain letter of the law is illustrated in the following paper by Jefferson, in which he strove to show the unconstitutionality of the proposition to establish a national bank.[1]

The first principle of the Constitu

I consider the foundation of the Constitution as laid on this ground: That "all powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people." (XIIth amendment.) To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.

[1] See above, p. 63.

No specific phrase of the Constitution authorizes a bank.

The incorporation of a bank, and the powers assumed by this bill, have not, in my opinion, been delegated to the United States, by the Constitution.

I. They are not among the powers specially enumerated: for these are:

1st. A power to lay taxes for the purpose of paying the debts of the United States; but no debt is paid by this bill, nor any tax laid. Were it a bill to raise money, its origination in the Senate would condemn it by the Constitution.

2d. "To borrow money." But this bill neither borrows money nor ensures the borrowing of it. The proprietors of the bank will be just as free as any other money holders, to lend or not to lend their money to the public. The operation proposed in the bill, first, to lend them two millions, and then to borrow them back again, cannot change the nature of the latter act, which will still be a payment, and not a loan, call it by what name you please.

3d. To "regulate commerce with foreign nations, and among the States, and with the Indian tribes." To erect a bank, and to regulate commerce, are very different acts. He who erects a bank, creates a subject of commerce in its bills; so does he who makes a bushel of wheat, or digs a dollar out of the mines; yet neither of these persons regulates commerce thereby. To make a thing which may be bought or sold, is not to prescribe regulations for buying and selling. Besides, if this was an exercise of the power of regulating commerce, it would be void, as extending as much to the internal commerce of every State, as to its external. For the power given to Congress by the Constitution does not extend to the internal regulation of the commerce of a State, (that is to say of the commerce between citizen and citizen,) which remain exclusively with its own legislature; but to its external commerce only, that is to say, its commerce with another State, or with foreign nations, or with the Indian tribes. Accordingly the bill does not propose the measure as a regulation of trade, but as "productive of considerable advantages to trade." Still less are these powers covered by any other of the special enumerations.

II. Nor are they within either of the general phrases, which are the two following: —

The "genera welfare clause examin

1. To lay taxes to provide for the general welfare of the United States, that is to say, "to lay taxes for the purpose of providing for the general welfare." For the laying of taxes is the *power*, and the general welfare the *purpose* for which the power is to be exercised. They are not to lay taxes *ad libitum for any purpose they please;* but only *to pay the debts or provide for the welfare of the Union.* In like manner, they are not to do *anything they please* to provide for the general welfare, but only to lay taxes for that purpose. To consider the latter phrase, not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please, which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless. It would reduce the whole instrument to a single phrase, that of instituting a Congress with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil, it would be also a power to do whatever evil they please . . .

The "necess and pr clause examin

2. The second general phrase is, "to make all laws *necessary* and proper for carrying into execution the enumerated powers." But they can all be carried into execution without a bank. A bank therefore is not *necessary*, and consequently not authorized by this phrase.

It has been urged that a bank will give great facility or convenience in the collection of taxes. Suppose this were true; yet the Constitution allows only the means which are "*necessary*" not those which are merely "convenient" for effecting the enumerated powers. If such a latitude of construction be allowed to this phrase as to give any non-enumerated power, it will go to every one, for there is not one which ingenuity may not torture into a *convenience* in some instance *or other*, to *some one* of so long a list of enumerated powers. It would swallow up all the delegated powers, and reduce the whole to one power, as before observed. Therefore it was that the Constitution restrained them to *the*

necessary means, that is to say, to those means without which the grant of power would be nugatory.

98. *The Doctrine of Liberal Construction*

Chief Justice Marshall, in the case of Gibbons *v.* Ogden, made the following reflections on the principle of strict construction, and stated his reasons for refusing to adopt it.

This instrument contains an enumeration of the powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants expressly the means for carrying all others into execution, Congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used is not extended to the powers which are conferred; nor is there one sentence in the Constitution which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it.

What do gentlemen mean by strict construction? If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the terms, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of that instrument, — for that narrow construction which would cripple the government and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent, — then we cannot perceive the propriety of this strict construction,

nor adopt it as the rule by which the Constitution is to be expounded. As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas which they intend to convey, the enlightened patriots who framed our Constitution and the people who adopted it must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfections of human language, there should be serious doubts respecting the extent of any given power, it is a well-settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction.

99. *The Principle of Liberal Construction Applied**

In upholding the doctrine that Congress had an implied power to create paper money even in the absence of any express provision to that effect, the Supreme Court laid down this basis for a liberal interpretation: —

The general intent of the frame to be discovered first.

When investigating the nature and extent of the powers conferred by the Constitution upon Congress, it is indispensable to keep in view the objects for which those powers were granted. This is a universal rule of construction applied alike to statutes, wills, contracts, and constitutions. If the general purpose of the instrument is ascertained, the language of its provisions must be construed with reference to that purpose, and so as to subserve it. In no other way can the intent of the framers of the instrument be discovered. And there are more urgent reasons for looking to the ultimate purpose in examining the powers conferred by a constitution than there are in construing a statute, a will, or a contract. We do not expect to find in a constitution minute details. It is necessarily brief and comprehensive.

The Constitut is only ar outline of the gover ment.

It prescribes outlines, leaving the filling up to be deduced from the outlines. In Martin *v.* Hunter, 1 Wheaton 326, it was said, "The Constitution unavoidably deals in general language. It did not suit the purpose of the people in framing this great charter of

our liberties to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution." And with singular clearness was it said by Chief Justice Marshall, in M'Culloch *v.* The State of Maryland, 4 Id. 405, "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which it may be carried into execution, would partake of the prolixity of a political code, and would scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."

The paramount object of the Constitution.

If these are correct principles, if they are proper views of the manner in which the Constitution is to be understood, the powers conferred upon Congress must be regarded as related to each other, and all means for a common end. Each is but part of a system, a constituent of one whole. No single power is the ultimate end for which the Constitution was adopted. It may, in a very proper sense, be treated as a means for the accomplishment of a subordinate object, but that object is itself a means designed for an ulterior purpose. Thus the power to levy and collect taxes, to coin money and regulate its value, to raise and support armies, or to provide for and maintain a navy, are instruments for the paramount object, which was to establish a government, sovereign within its sphere, with capability of self-preservation, thereby forming a union more perfect than that which existed under the old Confederacy. . . .

Clauses may be grouped and inferences drawn.

And here it is to be observed it is not indispensable to the existence of any power claimed for the Federal government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all

that the power claimed has been conferred. Such a treatment of the Constitution is recognized by its own provisions. This is well illustrated in its language respecting the writ of *habeas corpus*. The power to suspend the privilege of that writ is not expressly given, nor can it be deduced from any one of the particularized grants of power. Yet it is provided that the privileges of the writ shall not be suspended except in certain defined contingencies. This is no express grant of power. It is a restriction. But it shows irresistibly that somewhere in the Constitution power to suspend the privilege of the writ was granted, either by some one or more of the specifications of power, or by them all combined.

The first ten amendments sho the existe of general powers in the origin Constitut

And, that important powers were understood by the people who adopted the Constitution to have been created by it, powers not enumerated, and not included incidentally in any one of those enumerated, is shown by the amendments. The first ten of these were suggested in the conventions of the States, and proposed at the first session of the first Congress, before any complaint was made of a disposition to assume doubtful powers. The preamble to the resolution submitting them for adoption recited that the "conventions of a number of the States had, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added." This was the origin of the amendments, and they are significant. They tend plainly to show that, in the judgment of those who adopted the Constitution, there were powers created by it, neither expressly specified nor deducible from any one specified power, or ancillary to it alone, but which grew out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted. Most of these amendments are denials of power which had not been expressly granted, and which cannot be said to have been necessary and proper for carrying into execution any other powers. Such, for example, is the prohibition of any laws respecting the establishment of religion, prohibiting the free exercise thereof, or abridging the freedom of speech or of the press.

How Congress has exercised powers not expressly conferred.

And it is of importance to observe that Congress has often exercised, without question, powers that are not expressly given nor ancillary to any single enumerated power. Powers thus exercised are what are called by Judge Story, in his *Commentaries on the Constitution*, resulting powers, arising from the aggregate powers of the government. He instances the right to sue and make contracts. Many others might be given. The oath required by law from officers of the government is one. So is building a capitol or a presidential mansion, and so also is the penal code. This last is worthy of brief notice. Congress is expressly authorized "to provide for the punishment of counterfeiting the securities and current coin of the United States, and to define and punish piracies and felonies committed on the high seas and offences against the laws of nations." It is also empowered to declare the punishment of treason, and provision is made for impeachment. This is the extent of power to punish crime expressly conferred. It might be argued that the expression of these limited powers implies an exclusion of all other subjects of criminal legislation. Yet Congress, by the Act of April 30, 1790, entitled "An Act more effectually to provide for the punishment of certain crimes against the United States," and a supplementary act of March 3, 1825, defined and provided for the punishment of a large class of crimes other than those mentioned in the constitution, and some of the punishments prescribed are manifestly not in aid of any single substantive power. No one doubts that this was rightfully done, and the power thus exercised, has been affirmed by this court in United States *v.* Marigold, 9 How. 560. This case shows that a power may exist as an aid to the execution of an express power, or an aggregate of such powers, though there is another express power given relating in part to the same subject but less extensive. Another illustration of this may be found in connection with the provisions respecting a census. The Constitution orders an enumeration of free persons in the different States every ten years. The direction extends no further. Yet Congress has repeatedly directed an enumeration not only of free persons in the States, but of

free persons in the Territories, and not only an enumeration of persons, but the collection of statistics respecting age, sex, and production. Who questions the power to do this?

Under the power to establish post-offices and post-roads Congress has provided for carrying the mails, punishing theft of letters and mail robberies, and even for transporting the mails to foreign countries. Under the power to regulate commerce, provision has been made by law for the improvement of harbors, the establishment of observatories, the erection of lighthouses, breakwaters, and buoys, the registry, enrollment, and construction of ships, and a code has been enacted for the government of seamen. Under the same power, and other powers over the revenue and the currency of the country, for the convenience of the treasury and internal commerce, a corporation known as the United States bank was early created.

100. *The "Necessary and Proper" Clause* *

The Constitution authorizes Congress to make all laws "necessary and proper" for carrying into effect the express powers conferred upon it. This clause has received the following judicial interpretation: —

Absolute necessity not requir

By the settled construction and the only reasonable interpretation of this clause, the words "necessary and proper" are not limited to such measures as are absolutely and indispensably necessary, without which the powers granted must fail of execution; but they include all appropriate means which are conducive or adapted to the end to be accomplished, and which in the judgment of Congress will most advantageously effect it.

Congress must poss the choice of means.

Chief Justice Marshall expounded the clause giving Congress power to make all necessary and proper laws, as follows: "In construing this clause, it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be

adopted for that purpose, it might be said with respect to each, that it was not necessary, because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution. The government is to pay the debt of the Union, and must be authorized to use the means which appear to itself the most eligible to effect that object." 2 Cranch, 396.

CHAPTER XIV

CONGRESS AT WORK

101. *Party Organization in Congress**

NOWHERE have party machinery and methods twisted and warped the original theories of the Constitution more than in the conduct of business in Congress. Back of the formal organization of the House and Senate is the organization of the representatives of the two great parties into caucuses in which officers are chosen and policies are determined by vote. The party practices and the principles involved are thus discussed by Senators Patterson and Bailey in a spirited debate over the right of the Democrats in the Senate to bind party members by a caucus rule: —

The Senate proceeded to consider the resolution submitted by Mr. Patterson on the fifth instant, as follows:

. . . . Whereas, because it was currently reported that one or more Democratic Senators might vote upon certain matters pending before the Senate contrary to the views of a majority of the body of Democratic Senators, the Democratic Senators were called to caucus upon such matters; and

Whereas, it was found at such caucus that said reports were correct and that certain Democratic Senators might or would vote contrary to the views of said majority; and

Whereas, thereupon the following resolutions were presented and adopted by more than two-thirds of the Senators present at said caucus,

"*Resolved*, that the Senate ought not to advise and consent to the treaty between the United States and the Republic of Santo Domingo, now pending before the Senate.

"*Resolved*, That if two-thirds of this caucus shall vote in favor of the foregoing resolution, it shall be the duty of every Democratic Senator to vote against the ratification of the said treaty;" and

Whereas the apparent purpose of the said resolutions and action was to improperly induce or coerce Democratic Senators who might believe that the best interests of the country required the ratification of said treaty, and because thereof, held it to be their duty to vote for its ratification, into disregarding that part of their oaths in which they declared

that they would faithfully discharge the duties of their office as Senators; therefore, be it

Resolved, First. That such action by the said or any other caucus is in plain violation of the spirit and intent of the Constitution of the United States.

Second. That for two-thirds or any other number of the Senators of any party to meet and declare that "it shall be the duty" of any Senator to vote upon any question other than as his own convictions impel him, is a plain violation of the manifest intent and spirit of the Constitution all have sworn to uphold and defend.

Third. That the "one vote" the Constitution declares each Senator shall have is his own vote, and not the vote of any other or of any number of Senators and for a Senator to cast that one vote against his convictions of right and duty in the premises is to disfranchise his State in the Senate and to deprive it of the representation in that body the Constitution provides it shall have.

Fourth. That when any number of Senators by combination or otherwise undertake through any species of coercion, to induce other Senators to vote except as their judgments and consciences tell them, it is an innovation of the rights of a State to equal representation with other States in the Senate, and is subversive of their rights to equal representation and the votes of its Senators in the Senate that the Constitution has provided for.

Fifth. That the Senator who permits any body of other Senators to declare and define for him what his duty is in the matter of his vote in the Senate, and who casts his vote in response to such interference, votes not as a Senator from his own State, but as a Senator from the other States, and he augments the power of the other States beyond that permitted by the Constitution and weakens and degrades the power of his own State in the Senate in violation of the spirit of the Constitution.

Sixth. That for any Senator to vote except as his judgment and sense of duty under his oath of office requires is to degrade the high office of Senator and to assail the dignity and standing of the Senate of the United States — qualities possessed in such high degree by no other legislative body in the world.

xceptions
the
bligations
id on
iembers by
ie caucus.

I think I may refer with perfect propriety to the exceptions to the obligations of a caucus order of the Senatorial Democratic caucus. If I may not refer to the exceptions, I beg that some Senator will suggest its impropriety. I understand the exceptions are public, and that everybody knows them, and it is very much to the credit of the caucus that the exceptions have been made. First, the caucus order does not bind when to do so would, in the opinion of the Senator, cause him to violate the Constitution.

Second, it is not obligatory when he has in advance committed himself before the public. Third, it is not obligatory upon him when to vote as the caucus requests would cause him to violate the instructions of his State.

But, Mr. President, the second — when committed before caucus action — is of itself a condemnation of everything else. Why should it exempt a Senator simply because he has committed himself in the face of the public to the measure that is to be reached through a caucus? I suppose it is because it would humiliate him in the eyes of the public. It is not the desire of the caucus to humiliate a Senator. Therefore, because he would seem to be inconsistent, because it would appear that he was driven by caucus action to vote against his convictions, the caucus resolutions shall not apply.

One exce conc the syst

Ah, Mr. President, it does not provide, however, for the conscience of a Senator. It does not provide against humiliating himself in his own estimation. Because it would be a humiliation to a Senator after declaring to the public that he would vote one way, then, as a result of caucus action, to vote another; because it would put him or be liable to put him in a false light before the public, he is exempted. But he himself should be a monitor of which he should stand in awe. He should have regard for his own convictions. He should feel that it was of more importance to him to know that he was true to himself than to feel simply that he was true to a word which might have been spoken hastily, but having spoken which, he must not retract. Therefore the very exceptions prove the extreme injustice and the indefensible character of this so-called caucus action.

The sena ough to b agai cons

I believe, as I believe in the right of free speech, in the right of independent action, in the conference of the members of political parties; I believe that they cannot assemble too often for the purposes of evolving from what may be before the Senate, the right, and, throughout appeals to the reason and the logical sense of Senators, leading them to the proper line of action. In ninety-nine cases out of one hundred, that would seem to be the necessary

The is of reas and

result. We are here as Democrats or as Republicans. Our duty is not primarily to our party but to the country; but each desires the success and welfare of his party. His future depends upon the welfare of his party; then, unless there is some venial or corrupt purpose or operating influence, when his party colleagues meet in conference and the question is subjected to the test of common sense and duty and the welfare of the party, if the reason can be reached, the reason will be reached, and reason will prevail.

But it is also often coercive.

Mr. President, from what has been said and what appears in the public press, the caucus is not intended alone to reach the reason. It is coercive. Suggestions of White House Democrats, suggestions of Republicans surrendering for patronage fly thick and fast when the least independence is shown. The caucus action is the equivalent of saying, "When we cannot reach Senators through their reason, we will reach them through their fears." The caucus demand is the equivalent of declaring that "Senators are dishonest, and through motives and purposes and feelings that are degrading, we can keep a Senator in line with us, regardless of his honor and the delicacy of the communication that should exist between members of this body."

Coercive caucuses are demoralizing.

I think caucuses of this kind are demoralizing to those upon whom they are intended to operate. In my judgment, when you find a Senator willing to submit his conscientious convictions upon a great public question to the behest of a caucus because to violate the rule of a caucus would weaken him at the polls and make his chances of a return to the Senate fewer, you will find a man whose moral forces have been weakened and who is more likely to be reached by venial influences than the man who in his every vote stands by his convictions of duty.

The caucus only defines a senator's duty as a party member.

Mr. BAILEY. From the beginning to the end of his speech, and from the first line of his preamble to the last line of his resolution, the Senator from Colorado has proceeded upon a false hypothesis. He has assumed that his Democratic associates are seeking to deprive him of his right to cast his vote in the Senate

according to his own judgment and conscience; and he does betray either an inability or an unwillingness to understand the difference between his relation to the Senate and his relation to his party. The Democratic caucus has simply and only defined his duty as a Democrat, and it is for him to determine how far his duty as a Senator requires him to disregard his duty as a Democrat.

The nece maj rule part

Mr. President, there is no Senator in this body and I doubt whether there is any citizen of this country who is more tenacious of his opinion than I am; and yet, without any sacrifice of my self-respect, and without any sacrifice of my independence, over and again I have submitted to a decision of a majority of my party as to what candidate I should support and what platform he should stand upon. I expect to do that to the end, or until my party nominates such a man or promulgates such a platform that my duty as a citizen will not permit me to submit, and then I shall withdraw from the party, but in withdrawing I shall not try to sow the seeds of disorganisation there by denying their authority and jurisdiction to nominate a candidate and adopt a platform.

Sen bou obe stru

I believe, as the Senator from Colorado appears not to believe, in the right of the people to instruct a Senator. We are not here to represent ourselves. We are here to represent our States, and whenever I cannot honestly and conscientiously voice the sentiments of the people whose commission I hold, I will resign my seat in this body. I will not defy them; I will not keep their office and flaunt their convictions, but whenever I cannot obey their will and preserve my self-respect, I will take their commission back and lay it down unsullied at their feet and allow them to choose a Senator who can represent them without misrepresenting himself.

Par and pat

I am a partisan myself, but I must be permitted to believe that my partisanship had its origin in my patriotism. I am a partisan because I believe the glory and welfare of my country are bound up in the success of the principles of the Democratic party; and I freely declare my belief that the Senators on the other side are actuated by the same conviction. I have heard men say they were Democrats because they were born in that political faith, and that

other men are Republicans because they were so born. I have no doubt that this actually describes a certain class of men, but it can never describe the kind of a man who is fit to sit in the Senate of the United States as the ambassador from a great American Commonwealth. Those who come here are and ought to be controlled by a devotion to certain principles, and they unite themselves with a given party because they believe that party best calculated to promote the growth, the permanence, and the success of those principles.

tisanship
iires
:ptance
najority
in the
y.

Let us grant this, and what follows? As unerringly as night follows the day, it must follow that we recognize the right of the majority to prescribe the party conduct which is to perpetuate those principles. It will never happen that the party will take any position upon which every member of it will agree, but, agreeing in the main, they must consent to waive the immaterial or infrequent differences in order to promote the accomplishment of an important and common end.

strations
najority

That applies not only to political parties; it applies to every kind of an organisation. The right of the majority to rule is not a despotism. Jefferson declared it to be the vital principle of a Republic from which there is no appeal but to force. The rule of the majority is not only the vital principle of Republics but it is the vital principle of every organisation of every kind. Take your corporate institution organized for profit. So long as they pursue the object of their charter, the majority must rule. When the majority depart from the charter purpose, the member is not put to the necessity of withdrawing because he has investments there. He simply resorts to the courts and they dissuade the majority from abandoning the purposes of the incorporation. Take the great religious denominations of the country. Does a man forfeit his right to worship God, to believe in Christ and read the Scriptures simply because, belonging to the Methodist Church, he denies one of its tenets and is expelled? The Church expels a man who does not agree with it on important matters of doctrine but he can still serve and worship God in his own way. I believe

all Churches expel the unorthodox except the hard shell Baptist church, and it simply withdraws from the erring brother. There is no kind of an organisation under this flag to-day where the right of the majority to rule is not recognised and enforced. I subscribe to it; I submit to it cheerfully; and I only reserve the right, whenever I believe it departs so essentially from its fundamental principles that I can no longer co-operate with it, of doing as the Senator from Colorado has done more than once — I want the privilege of defying its decision.

102. *A Criticism on the Efficiency of the House of Representatives*

Mr. Bryce, in common with other European observers of the House of Representatives, is struck with the din of the House and its air of confusion and restlessness as compared with the decorum and dignity of the Senate or the Parliament of England. The House as a whole has proved a rather unwieldy working institution, and Mr. Bourke Cockran thus accounts for this condition of affairs: —

Causes the ine ciency the Ho

Mr. Speaker, It is to the proposal to extend the term of representatives in Congress that I desire to address myself. I sympathize most keenly with every one who wishes to make vigorous the control of the people over their representatives and over every branch of the Government. It is precisely for that reason that I believe in extending that term. This is the popular branch of our political system. Popular control of the Government can be made effective only by making this House efficient. This House is the one branch of our Government that according to all testimony, is steadily declining in power, and its decline is obviously a decrease in the direct influence of the people over legislation. To what must this decline of the House be attributed? To two causes — a defect, a fatal weakness in its structure as established by the Constitution, and almost inconceivable folly in the method of organization established by itself.

The difficul of spea in the House.

Sir, it is no exaggeration to say that the House is organized for disorder and incapacity. Look at it. This vast barnlike chamber

of itself is enough to make impracticable anything like intelligible debate. The distances between members in different parts of this Hall are such that conversation is seldom regarded as an interruption. In the resulting confusion, it is impossible to follow or even understand the proceedings. I sit in a part of the House now where for all that I can hear of the debates I might as well be out of the Chamber. To learn what the House is doing I must leave my seat, and this is forbidden by rules. To participate in the proceedings of the House I must therefore violate its rules. I can be attentive to my duties only by becoming disorderly in my behavior. Under the rules I am out of order now, for I am speaking from another Member's seat. If I attempted to speak from my own, I would be inaudible in a large part of the Hall.

Surely, Sir, it is not extravagant to say that the House seems to have embraced diligently every opportunity to reduce itself to incapacity by keeping itself in disorder. Against the absurdities of its own organization a complete remedy, of course, is always in its own hands. But the gravest cause of its incapacity is in the term of its Members, and this can be remedied only by a Constitutional amendment.

The Congress does not convene till the month of December preceding the choice of its successor. From the very moment he takes his oath of office before this desk, each Member is plunged into the throes of a struggle for reëlection. How can he perform his duties impartially and fearlessly while three-fourths of his attention must be distracted by the exigencies of his own position? You may say that the honest and efficient Member will neglect his personal interests and devote himself exclusively to his representative duties. Well, Mr. Speaker, what duty can be higher than seeing that his district is well represented? (Laughter.) And he must think himself the very best representative his district could find or else he could not justify himself in coming here.

The House is reduced to this position: in the first — the longer and more important — session, every Member is striving for renomination and reëlection from the very hour he is sworn in

until the adjournment, and in the second session he has either been beaten, in which case his interest in the session is sensibly reduced, if not wholly extinguished, or else he has been reëlected, in which case his sense of security is apt to be too great for efficiency. (Applause and laughter.) His whole service, except under very exceptional conditions, is confined to two sessions. In the first every thing tends to make him incapable. In the second, he may be indifferent. (Laughter.) We declare at every stage that the House is declining in influence. Yet we lose no chance to push it farther along on the downward slope. To me the wonder is not that the House has declined in consequence, but that any of its consequence survives.

The po three n

We organize ourselves with rules which are conceived apparently in distrust of our own honesty. Every experience of this House proves that when it is left to the control of its own majority, it evolves legislation of the very highest excellence; yet we surrender ourselves to three gentlemen (wiser perhaps than any other three, but not so wise as the whole 400 who compose our membership), and to this narrow minority we entrust the entire control and direction of our proceedings, holding to ourselves at most, merely a right to approve or to veto their proposals. And this upon the ground openly stated that if left to ourselves we would perpetrate enormities or follies. All this would be impossible in a House whose Members had such a term of office that they could become acquainted with each other, and by knowledge of their different capacities and qualities learn to coöperate effectively for wholesome legislation.

Why th Senate superio the Ho

Why has the Senate grown at the expense of this House, although the framers of the Constitution intended that we should be the dominant feature of our political system? Because the Senate is a continuous body! Every Member holds for six years. They find themselves bound together by a hundred influences growing out of extended association and however they may differ on other matters they stand always unitedly for the dignity and power of their Chamber.

103. *The Duties of the Speaker of the House*

The duties of the Speaker of the House of Representatives are thus laid down in the Manual of the Rules.

Supervision of the business of the House.

1. The Speaker shall take the chair on every legislative day precisely at the hour to which the House shall have adjourned at the last sitting, immediately call the members to order, and on the appearance of a quorum, cause the Journal of the proceedings of the last day's sitting to be read, having previously examined and approved the same.

2. He shall preserve order and decorum, and, in case of disturbance or disorderly conduct in the galleries, or in the lobby, may cause the same to be cleared.

3. He shall have general control, except as provided by rule or law, of the Hall of the House, and of the corridors and passages and of the unappropriated rooms in that part of the Capitol assigned to the use of the House, until further order.

Authentication of acts of the House.

4. He shall sign all acts, addresses, joint resolutions, writs, warrants, and subpoenas of, or issued by order of, the House, and decide all questions of order, subject to an appeal by any member, on which appeal no member shall speak more than once, unless by permission of the House.

Putting the question.

5. He shall rise to put a question, but may state it sitting; and shall put questions in this form, *to wit:* "As many as are in favor (as the question may be), say Aye;" and after the affirmative voice is expressed, "As many as are opposed, say No;" if he doubts, or a division is called for, the House shall divide; those in the affirmative of the question shall first rise from their seats, and then those in the negative; if he still doubts, or a count is required by at least one-fifth of a quorum, he shall name one from each side of the question to tell the members in the affirmative and negative; which being reported, he shall rise and state the decision.

His vote.

6. He shall not be required to vote in ordinary legislative proceedings, except where his vote would be decisive, or where the

House is engaged in voting by ballot; and in all cases of a tie vote the question shall be lost.

7. He shall have the right to name any member to perform the duties of the Chair, but such substitution shall not extend beyond an adjournment: *Provided, however*, That in case of his illness, he may make such appointment for a period not exceeding ten days, with the approval of the House at the time the same is made; and in his absence and omission to make such appointment, the House shall proceed to elect a Speaker *pro tempore*, to act during his absence.

Appointment of a substitute.

104. *The Political Significance of the Speakership* *

The speakership in the House of Representatives is thus contrasted with the corresponding position in the British House of Commons.

Mr. Towne. The Speaker is, in my judgment, almost as much sinned against as sinning. The fact that under both Republican and Democratic régimes very largely the same complaint has been made in respect to the exercise of quasi-autocratic power by the Chair, is itself a recognition to a considerable degree that the necessity for exercising that kind of power inheres in the duties of the office itself as it has evolved in our system.

Evidence of the necessity for quasi-autocratic power.

The Speakership of this House, Sir, in its origin was not a political office. It is interesting to contrast it with the speakership of the English House of Commons, whence we borrow very largely the model upon which this House is constructed. In the House of Commons the speaker is a mere moderator, who presides over a parliamentary body for the purpose of enforcing ordinary parliamentary rules. The office has no political significance. That fact is illustrated by the recent reëlection of Mr. Lowther, the Conservative speaker, by the new enormous Liberal majority in the House of Commons.

The speakership in the House of Commons.

If a speaker is a competent parliamentarian, a fair man, and a man of ability, no majority in the English parliament cares to

How the English speakership evolved.

which party he belongs. But originally the English speaker was a political officer. His name signifies it. He spoke for the Commons with the King, and to a considerable degree was able to direct the deliberations of the House and to select the subjects upon which it should deliberate. In process of time there developed the English ministry, the responsible element in the control of the legislature in the British system. The ministry determines all the initiative in legislation, marks out the program for the Commons, determines what propositions of legislation shall come before that body; and the opposition — I may interpolate at this point — has always the right to propose and discuss amendments. That function is ever the great factor in that general system of government to which the English Commons and this body belong, a system that the great commentator Bagehot has called a government by discussion; and if at any time this House shall ever have its ancient dignity and power restored and shall again appeal to the imagination and respect of the people of America, it will be when it shall have vindicated for itself the right to discuss all public measures proposed here. (Loud applause.)

The Speaker a sort of prime minister.

But in America we have never evolved anything that answers to the British Cabinet or ministerial system. There must, however, in every majority temporarily controlling the deliberation of this House, be somewhere an initiative, the power of determining the policy according to which the majority shall choose to proceed, and how it shall exercise that power. It is interesting to note how this function has become an asset of our Speakership, an evolution in that office having occurred directly opposite from that which marked the English speakership. Speaker Muhlenberg, the first Speaker of the House of Representatives, nearly one hundred and twenty years ago, was a mere presiding officer, but in the course of time, the officer who commenced as a mere moderator has developed into the most powerful political functionary in our government.

The majority can change the rules.

There are some things that those who propose to reform the rules of the House can entertain little difference about. One of them was suggested very ably by the gentleman from Tennessee

in answer to a question. We can change the rules of the House. We can if we will. We will not if we submit ourselves to the dictation of a few men on grounds of alleged party interest and refuse to stand in favor of the inherent legislative rights of the House. A majority party can, if it will, make a few simple changes in rules that will go a great way to restore the ancient capacities and prestige of the House.

The Speaker's power of recognition.

For instance, now, if a man on the floor of this House desires to challenge the attention of the Chair, he must arise in his place and address the Speaker; and, as I think the language of the rule is — although I have not seen it lately — "upon being recognized, he shall proceed in order." If he is not recognized he cannot proceed and we witness this anomalous and insulting thing — although the Speaker is not in a personal sense to blame for it, let me say, it is inherent in the rules — that a man representing a great American constituency with something to speak about and to think about and to propose to this great body on his individual and political responsibility arises in his place here and the Speaker says to him, "For what purpose does the gentleman arise?" And if the purpose does not suit the speaker, the member has not to any effectual purpose, arisen at all, but has to take his seat.

Now, Sir, when two or more men are contemporaneously challenging the attention of the Chair, it is a mere necessity that he shall choose which one to recognize. No rule can ever obviate that; but it has happened time and again — it happened in my own case in the Fifty-fourth Congress — that but one member is asking recognition from the Chair and that he cannot get the floor. Now, I undertake to say that any Representative of a great constituency of the American people upon this floor has the right, or ought to have the right, to ask the attention of the Chair and of the House to anything he wishes to bring to the attention of this Assembly when nobody else is claiming the floor at the same time.

105. *The Sources of the Speaker's Power*

The way in which the Speaker of the House, as the representative of the majority, controls the business of that body is thus excellently described by Mr. Ewing Cockrell in an article in the *Arena*: —

he power appointing ommittees.

The greatest political power of the Speaker comes from his control over the committees of the House. The power of the committees lies in the fact that substantially every bill or resolution of a legislative character introduced in the House must be referred to some committee, and before it can be passed it must be reported from such committee back to the House. If the committee chooses it may not report the bill, and in such a case the measure is practically dead. If it does report the bill, and reports it favorably, the bill is placed on the calendar, and has about one chance in three of being passed — as the House can pass in a Congress only about one-third of the bills reported to it by its committees. The power of the Speaker through these agencies lies in the fact that in making up the committees he can appoint whom he chooses.[1] He can appoint men whom he knows to have the same views on certain subjects that he has, or who he knows will follow his instructions. Thus at the very beginning of a Congress he may determine a large part of the legislation to be enacted.

he ght of cognition.

Of the bills reported favorably by the committees it is the Speaker who decides which shall pass. He does this by recognizing members to call up for consideration only such bills as he has approved; and the right of the Speaker to recognize whom he will is absolute. Not only is recognition the Speaker's most absolute power, but it is also the most continuous. It is exerted throughout the whole of the Congress, and determines nearly all the private and minor legislation. The use of the power of recognition, so far as it affects legislation, is modified by party stress and the personal wishes of the Speaker. In party fights the power of the Speaker through recognition rises immensely; for the minority is absolutely helpless even to avail itself of the rules, unless it can first get the recognition

[1] Even in this he is largely controlled by the wishes of the leaders of his party.

of the Speaker. The use of the right of recognition varies chiefly with his personal will. As a rule, the Speaker follows the wishes of his party in the House; yet, at the same time, if he chose he might easily defeat the will of the majority through his control of recognition. And as a matter of fact this has often been done, especially by Mr. Reed in the last Congress.

Control over the order of business.

Besides the control over the order of business, which the Speaker exerts through the committees and through recognition, he now, through the convenient and effective Committee on Rules, exercises a general control over all the important business of the whole Congress.

Decisions on question of parliamentary procedure.

The Speaker decides all questions of parliamentary procedure. In general he exercises but little influence over legislation through this power, yet there are times when this same power affects legislation in the highest degree. For instance, in the Fifty-first Congress, Mr. Reed by his parliamentary rulings determined a very large part of the legislation of that Congress. Mr. Blaine, while Speaker, by rulings directly opposite to the later ones of Mr. Reed, prevented his party from pushing the great "Force Bill" through the House.

The Speaker's personal influence.

The Speaker exercises a great deal of influence as a man. Of course, the amount of legislation thus determined depends entirely upon the Speaker's personal ability. This direct influence is exerted chiefly in controlling the reports of committees, and in deciding with other leaders what measures shall be passed during the Congress. . . .

The Speaker in the majority.

The Speaker is the slave of the majority — and its absolute master. This is not a paradox, but simply a statement of the extremes of the Speaker's relations with his party. There are times when the Speaker completely thwarts the will of a majority of the House. He does this usually by having his committees never report bills favored by the House, or by refusing to recognize members to call up measures to which he is opposed. This was the case in the last Congress with the many resolutions for Cuban belligerency and independence, which Mr. Reed would not allow to be con-

sidered. However, while the Speaker can prevent the House from considering a bill, he can never force it to pass a bill against its wishes. On the other hand, all the Speaker's powers come from the majority, and are held only at its will. And whenever a majority of the House is sufficiently determined to pass a measure, it can always do so, sooner or later, notwithstanding all the Speaker can do. However the Speaker and his party almost always work together. When they disagree, nine times out of ten the Speaker has to yield.

106. *How the House Disposes of Its Business*

Mr. Dalzell has given in an article in the *Independent* the following brief account of the way in which the mass of business before the House is handled.

he introiction and ference bills.

In the last Congress (59th) there were 386 members (in this Congress there are 391), and there were introduced a total of bills and resolutions numbering 27,114. It goes without saying that not all of these bills could be considered nor could all of these members have a hearing. Theoretically every member of the House is the equal of every other member; every constituency is entitled to equal recognition with every other constituency, but practically there cannot be 391 Speakers; there cannot be 391 chairmen of committees, nor equal recognition for debate given to 391 members. The real purpose, then, to be accomplished by the rules is the selection from the mass of bills introduced those proper to be considered. There is no limitation on the right of a member to introduce bills; as many as he likes and of whatever character he pleases. Every bill introduced goes to an appropriate committee for consideration, and whether or not it gets upon a House calendar for action depends upon its being reported by the committee. It may never be reported, and, of course, if not reported can never be considered in the House. In the last Congress, of the 27,114 bills and resolutions introduced there were 7,839 reported; the others remained in the pigeon-holes of the various committees. Of the bills reported, 7,423 were considered and passed.

Bills when reported go upon certain calendars of the House according to their character. Revenue and appropriation bills: these are few in number, not to exceed perhaps twenty. They come from the Committee on Ways and Means, whose office it is to provide revenue for the Government, and from the Committee on Appropriations, and from the several committees having to do with the maintenance of the Government in its various arms, such as the Naval Committee, the Military Committee and others. These bills when reported go to a calendar known as the Union Calendar, but they are highly privileged, as they ought to be, for without their passage the Government wheels would stop. They can be called for consideration at any time. They take precedence of all other bills, and the Speaker has no alternative but to recognize the member calling them up. These bills are considered, not in the House, but in Committee of the Whole; the Speaker leaves the chair and another member takes his place.

1. Revenue and appropriation bills.

Another class of bills are such as relate to some public purpose, but carry no appropriation, such, for instance, as bridge bills and the like. To a large extent bills from the important committees on the Judiciary and on Interstate and Foreign Commerce are of this class. These bills go on the House calendar and are entitled to consideration in the morning hour. There being no privileged bills for consideration, the morning hour is the regular order. The Speaker must call the committees in their alphabetical order, and then the chairman of the committee which has the call is entitled to recognition by the Speaker as of right. The House then proceeds to the consideration of such bill reported by the committee in question and then on the House calendar as the chairman calls up, and continues its consideration until a vote is had, subject only to a possible interruption at the end of sixty minutes, to which I will refer hereafter. But even if interrupted its consideration is continued thereafter, when business of that character is in order, until it is finally disposed of.

2. General bills carrying no appropriations.

In addition to public bills such as I have enumerated, some carrying an appropriation and others not, there is another class of

3. Private bills and measures for the District of Columbia.

bills, the most numerous of all — private bills providing for the relief of private individuals or corporations. These have a calendar of their own called the private calendar, and are in order on every Friday of each week. They are, generally speaking, bills from the Committee on Claims, from the Committee on War Claims and from the Committee on Pensions. As to these bills the Speaker has no independent right of recognition. When addressed by the chairman of the appropriate committee on a Friday he must recognize him, and unless the House declines to consider these bills the Speaker must leave the chair and nominate a member to preside in his place. In the last Congress there were reported 6,834 private bills; 6,624 were passed, leaving 210 undisposed of.

There is another class of bills that, like private bills, have a day of their own under the rules, viz., District of Columbia bills. As is well known, there is no right of suffrage in the District of Columbia, and the Senate and House act as its Select and Common Councils. District of Columbia bills are in order on two Mondays of every month. As to these bills, again the Speaker has no alternative but to recognize the Chairman of the District Committee when, on his allotted day, he calls up his business.

4. General bills involving appropriations.

A fourth class of bills provide for various matters of public concern and are such as involve a charge upon the Treasury. These go to the Union Calendar, and when considered must be considered in Committee of the Whole. At the end of the morning hour (sixty minutes) a motion may be made to go into Committee of the Whole for the consideration of bills on the Union Calendar or for the consideration of some particular bill thereon. This motion the Speaker is bound to entertain.

Unanimous consent.

Then a large part of the business of the House is done wholly outside of the rules, by unanimous consent. Some gentleman, for instance, arises in the House and, being recognized by the Speaker, asks "unanimous consent for the present consideration of the following bill." Unless objection is made the bill is considered and voted on. It is in connection with this practice and

because of it that autocratic power is without any reason ascribed to the Speaker. But the rules have nothing at all to do with this. The applicant for recognition asks that all rules be set aside. To this any member of the House may object. Why should complaint be made if the Speaker exercises his right of objection by refusing to recognize an applicant for recognition in any particular case? Because he is Speaker he is no less a member of the House; no less a Representative of his Congressional District. If he were on the floor he could interpose an objection to any request for unanimous consent. Should he be less able to interpose that objection because he is in the chair? Certainly not.

107. *Congress and Presidential Influence*

In a reply to an attack made by Senator Tillman on President Roosevelt for his insistence in forcing measures upon Congress, Senator Beveridge made this defense: —

The basis of the President's influence.

Mr. President, why was it that Andrew Johnson had no influence with Congress and that Theodore Roosevelt has infinite influence with Congress? It is because one of them had not the confidence of the people, and the other one has the entire confidence of the people. It is one of the most beautiful, as well as one of the most beneficent, workings of our popular form of government that any branch of it that at any particular period best represents the people has the confidence of the people.

Why Cleveland lost control.

Why was it that in the last Democratic Administration its President lost the control of Congress almost as completely as did Andrew Johnson, and that the Senator's own party, together with his colleagues on this side had the confidence of the people? It was because they more accurately represented the people's thoughts, needs, demands, and aspirations. There is no subserviency upon this side of the chamber to any power on earth except to the public opinion of the American people. What the Senator thinks is subserviency to the demands of the President is only our Repub-

lican harmony with those demands which are nothing more than the demands of the American people.

Popular support *vs.* patronage.

Mr. President, strange to say the Senator indulges — as politicians in search of any issue no matter how able they are, must unfailingly indulge, — in a paradox, one side of which destroys the other. The Senator described the President's power as coming from his appeals to "the ignorant masses" and in the same breath he said that that power comes from his use of patronage. Was it the use of patronage, Mr. President, that impressed Congress with the necessity of a single law that the President has recommended in the last seven historic years, the passage of which his recommendation helped to secure?

The President voiced popular wisdom.

Was it the use of patronage that got through the law establishing the Department of Commerce and Labor, perhaps the greatest and most important piece of legislation that has been passed by an American Congress since the Constitution was adopted, with perhaps the single exception of the Platt amendment? The Senator denounces us for voting for the very laws which the Senator and his colleagues seeking every excuse they could find for not voting for, yet were compelled to vote for. Take all of these great laws, which are a part of this mighty structure of righteousness which the wisdom of the American people, as voiced by the President, has enacted into statutes by this Congress on both sides — does the Senator disagree with one of them? Would he repeal a single line of any of them? Does the Senator, speaking for his side propose to go before the American people with the proposition to abolish the Department of Commerce and Labor? No. To repeal the railway rate law? No. To repeal the pure food law? No. To repeal the meat inspection law? No. To repeal the irrigation law? No. To repeal or mangle a single one of those great laws which constitute the Republican legislative record, every one of which was passed upon the recommendation of the President made in his messages? No.

108. *Departmental Preparation of Bills*

In this extract from a debate in the Senate is discussed the problem of how far executive departments ought to go in pressing legislation in Congress: —

MR. CARTER. Under date of December 4, 1905, the Attorney General communicates as follows — this is addressed to the Speaker of the House of Representatives and was laid before the House in regular order of business as a communication. It was likewise sent to the Senate. I am informed that the practice is for all communications to be printed as addressed to the first House in which they happen to be presented, and each communication is presented in both Houses. This letter reads:

A con cation the At Gener

> Herewith enclosed is the draft of a proposed bill to repeal section 11, etc.

It goes into a lengthy statement of the reasons why the bill should become a law.

MR. ALDRICH. Has the Senator any precedent prior to the present Administration of any communication of that character from any Department except the Department of the Interior?

MR. CARTER. I assume that the Department of the Interior has not recently indulged in an innovation by communicating haphazard to Congress in a manner entirely dissimilar from the methods heretofore employed. I do know that the Department of Commerce and Labor, the Department of Justice, the Treasury Department, the Interior Department, the War Department, and other Departments have been in the habit of communicating here precisely as the Secretary of the Interior communicated yesterday, and such communications have always been ordered printed and referred just as the communication received yesterday from the Secretary of the Interior was printed and referred.

The genera practi such n

MR. LODGE. Mr. President, I think I was correct in saying that the habit has insensibly grown up and that it also is spreading on the part of heads of Departments to make voluntary communi-

The practi irregu

cations or to volunteer communications directly to the Senate or to the House. I do not think it can be controverted that strictly those communications can only come through the transmission by the President and I think it is always well to be a little strict in the observance of the law and not to allow such irregular customs, even if apparently harmless, to grow up. But certainly, Mr. President, the practice of submitting bills from the Departments without request to the two houses is something quite recent, unless my memory is all astray, and that is a very much more important matter. . . . I think, Mr. President, it is well to put a stop to this submission of drafts of bills to Congress by subordinate executive officers or by heads of Departments unless they are thereto requested by one of the two Houses. I do not think that volunteering bills from the Executive Department is the proper method.

e
glish
tem.

Of course under the English system the bills are prepared by the executive government, which is a committee in fact of the two Houses, and they prepare their own measures and introduce them. But here the Executive Department is distinct and unless we ask for drafts of bills for our own convenience and for the promotion of good legislation, it seems to me that it is irregular and unwisely irregular to fall into the practice of having officers of the Executive Department present bills to Congress in this way.

Half a dozen came in the other day. They were referred to committees without taking any readings. They were referred to committees for consideration. Those bills had no Calendar number. They do not take the ordinary course of any other bills. I think it is irregular both under the rules and under the statute.

e proper
thod to
followed.

I do not want to cut off the advantage that we have in getting officers of the Departments to draw proper bills for us. That is a duty which I hope they will always perform on the request of the Houses. But I do not think that they ought to submit bills unasked for, which shall go in this irregular way to committees for consideration. If the head of a Department has legislation in which he is interested and presents it to the chairman of the com-

mittee or some other Senator and he sees fit to introduce it, that of course is perfectly proper. The bill takes the usual course. But this is irregular, just as is this method of submitting reports. I do not care how long the custom has lasted, it is an irregularity which has grown up. If we are to have information volunteered from the Departments, let it come through the President of the United States and any other information we want from the Departments we can ask for.

109. *Log-rolling in Congress*

This passage from a speech by Mr. Lilley in the House of Representatives illustrates the way in which members attempt to secure the expenditure of government money in their respective states: —

A short of approp tions.

On December 2, Mr. Taylor introduced a bill calling for a naval station at or near Fort Morgan, Ala.

On the next day Mr. Cooper of Texas called for the establishment of a dry dock on or near Sabine Pass.

On the 9th of December, Mr. Lamar of Florida came after "not more than two million dollars for a dry dock at Pensacola."

On the same day, Mr. Sulloway of New Hampshire was after a million and a half for Portsmouth, although a battleship cannot get to this port in safety.

On the 12th of December, Mr. Smith of California came into the field with a proposition for a dry dock on the bay of San Diego, California, for which he called for a million.

On the 19th, Mr. Granger of Rhode Island put in his proposition for a dry dock and repairing station "at a suitable strategic point on the Atlantic."

On January 6th, Mr. Gregg presented the demands of Texas for a dry dock at or near Galveston, Tex.

And then on January 20, came the proposition to buy the defunct Jamestown Exposition, fathered by Mr. Maynard of Virginia, which if adopted would add $2,500,000 to the grand total of waste on navy yards.

Each one I imagine, like Senator Tillman wants a "slice for his constituents." A member of a recent congress complained to me that although he had secured six millions out of the Treasury for his district, an ungrateful constituency were supporting six competitors against him for renomination. I believe, and I am certain the American people will believe that he should have given more attention to the country at large rather than have kept an eye single to his particular district.

110. *The Senate at Work**

The freedom of debate in the Senate as contrasted with the party discipline imposed in the House is thus described by Mr. H. L. West in a recent article in the *Forum*.

e power
he single
mber in
Senate.

In the Senate the individual is supreme. Any Senator may address the presiding officer and secure recognition at any time when the floor is not occupied by a colleague. He can offer a resolution upon any subject, and, through admirable rules, can place the Senate upon record as to its disposition. If the majority of the Senate desires to send the resolution to some committee crypt, where it shall remain buried until the campaign, for instance, is safely over, the reference is secured only after a yea-and-nay vote. If the resolution goes upon the calendar, any Senator can at any time move that the Senate proceed to its consideration — a question which must be determined without debate. This again places the Senate upon record, and is a proceeding almost unknown in the House. Almost every day the record is made up in the Senate upon some test question, because the right of the individual is not abridged or restricted.

limited
ate.

As long as any Senator desires to speak upon any bill under consideration, just so long must a hearing be accorded and a vote postponed. This is what is popularly known as unlimited debate. It is the one thing which makes the Senate absolutely unique in legislative bodies. Only recently the River and Harbor Appropriation Bill failed to reach a final vote, because a Senator occupied

the floor during the last thirteen hours of the session, ostensibly criticising the measure, but, in reality, talking against time, with the knowledge that when the hands of the clock reached the hour of noon, Congress would expire by limitation, and the bill would die. In its own way, the Senate accomplishes more work — that is it enacts more bills — than the House of Representatives. No Senator objects for the mere sake of objecting; because he is aware that if he is captious, he will himself encounter innumerable stumbling-blocks when he seeks the passage of measures in which he is interested. He is only one of ninety Senators, any one of whom has every privilege which he enjoys.

Indepen ence of Senators

It is the fact that each Senator is a power unto himself that gives the Senate its peculiar place in our system of government. When a vote upon a treaty or an important measure is to be canvassed, it is necessary to know the individual view of each Senator, a task frequently surrounded with some difficulty. There is more independence of thought and action in the Senate than in the House. Instances where two Senators of the same political party from the same State vote upon opposite sides of the same question are by no means rare, and, of late years, have become quite common. Party leaders, therefore, take occasion, during the days occupied in a prolonged debate, to investigate the condition of their own ranks, and strengthen, by such pressure as may be most effective, any weakness they may discover.

The recogniti of talent

The right of any Senator to speak at any time, upon any subject, and at any length, develops orators and debaters. No man who possesses a talent in this direction need lack of opportunity to prove his capacity. If he is really a great orator, if he actually demonstrates his logical and thoughtful mind, he forges to the front, and must be reckoned with by those who assume leadership. If, on the other hand, he is dull and slow-witted, lacking both strength of thought and forcefulness of expression, he will sink by his own weight.

III. *Communications between the Houses*

These extracts from the Congressional Record illustrate the way in which agreements and disagreements between the two bodies are registered, and arrangements made for conferences.

Senate approval of House amendments.

A message from the Senate, by Mr. Parkinson, its reading clerk, announced that the Senate had agreed to the amendments of the House of Representatives to the bill (S. 640) to extend the provisions, limitations, and benefits of an act entitled "An act granting pensions to the survivors of the Indian wars of 1832 to 1842, inclusive, known as the Black Hawk war, Creek war, Cherokee disturbances, and the Seminole war," approved July 27, 1892.

The joint conference committee.

This message also announced that the Senate had disagreed to the amendments of the House of Representatives to the bill (S. 5269) to provide a commission to secure plans and designs for a monument or memorial to the memory of Abraham Lincoln, late President of the United States, had asked for a conference with the House on the disagreeing votes of the two Houses thereon, and had appointed Mr. Wetmore, Mr. Hansbrough, and Mr. Vest as the conferees on the part of the Senate.

CHAPTER XV

THE FEDERAL JUDICIARY

112. *Constitutional Provisions*

ARTICLE III

The courts.

SECTION 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior; and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

Jurisdic of the courts.

SECTION 2. The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign states, citizens, or subjects.

In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

113. *Power of the Courts to Pass on the Constitutionality of Federal Statutes*

The Constitution nowhere expressly confers upon the Supreme Court the power of declaring statutes invalid on the ground of unconstitutionality. This power has been derived with inexorable logic from the nature of the instrument itself, and was for the first time asserted by Chief Justice Marshall in the celebrated case of Marbury *v.* Madison from which this extract is taken.

The decision based on certain principles.

The question whether an Act repugnant to the Constitution can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

The right of the people to create governments with limited powers.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent. This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

Why limitations not to be obeyed?

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what pur-

pose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative Act repugnant to it; or, that the legislature may alter the Constitution by an ordinary Act.

The Constituti is either paramoun or it is no

Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative Acts, and, like other Acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative Act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Paramountcy an essenti feature of written constitutic

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an Act of the Legislature, repugnant to the Constitution, is void. This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

Does an invalid la bind the courts?

If an Act of the Legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

The high law must prevail.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particu-

lar cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary Act of the Legislature, the Constitution, and not such ordinary Act, must govern the case to which they both apply.

herwise
e Consti-
tion is
bverted.

Those, then, who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an Act, which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such Act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

guments
om the
ture of the
nstitution.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favor of its rejection. The judicial power of the United States is extended to all cases arising under the Constitution. Could it be the intention of those who gave this power, to say that in using it the Con-

stitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises? This is too extravagant to be maintained. In some cases, then, the Constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

Illustrat of the doctrine

There are many other parts of the Constitution which serve to illustrate this subject. It is declared that "no tax or duty shall be laid on articles exported from any State." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the Constitution, and only see the law? The Constitution declares "that no bill of attainder or *ex post facto* law shall be passed." If, however, such a bill should be passed, and a person should be prosecuted under it, must the court condemn to death those victims whom the Constitution endeavors to preserve? "No person," says the Constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." Here the language of the Constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative Act?

The juc oath to support Constit

From these, and many other selections which might be made, it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of the courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support! The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this sub-

ject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as . . . , according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States." Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rules for his government — if it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

ıe
ınstitution
: supreme
v of the
ıd.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank. Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution, is void; and that courts, as well as other departments, are bound by that instrument.

114. *The Power of the Federal Courts over State Statutes*

The power of the Supreme Court to draw before it by proper process state statutes and to determine whether or not they contravene provisions of the federal Constitution is thus explained and defended by Justice Story in the case of Martin *v.* Hunter's Lessees.

ıte courts
ıst test
.te laws
the
leral
ınstitution.

A moment's consideration will show us the necessity and propriety of this provision in cases where the jurisdiction of the state courts is unquestionable. Suppose a contract for the payment of money is made between citizens of the same state, and performance thereof is sought in the courts of that state; no person can doubt that the jurisdiction completely and exclusively attaches, in the first instance, to such courts. Suppose that at the trial the defendant sets up in his defense a tender under a state law, making paper

money a good tender, or a state law, impairing the obligation of such contract, which law, if binding, would defeat the suit. The constitution of the United States has declared that no state shall make anything but gold or silver coin a tender in payment of debts, or pass a law impairing the obligation of contracts. If Congress shall not have passed a law providing for the removal of such a suit to the courts of the United States, must not the state court proceed to hear and determine it? Can a mere plea in defense be of itself a bar to further proceedings, so as to prohibit an inquiry into its truth or legal propriety, when no other tribunal exists to whom judicial cognizance of such cases is confided? Suppose an indictment for a crime in a state court, and the defendant should allege in his defense that the crime was created by an *ex post facto* act of the state, must not the state court, in the exercise of a jurisdiction which has already rightfully attached, have a right to pronounce on the validity and sufficiency of the defense? It would be extremely difficult, upon any legal principles, to give a negative answer to these inquiries. Innumerable instances of the same sort might be stated in illustration of the position; and unless the state courts could sustain jurisdiction in such cases, this clause of the sixth article [1] would be without meaning or effect, and public mischiefs, of a most enormous magnitude, would inevitably ensue.

It must, therefore, be conceded that the constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals. It was foreseen that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognizance of cases arising under the constitution, the laws and treaties of the United States. Yet to all these cases the judicial power, by the very terms of the constitution, is to extend. It cannot extend by original jurisdiction if that was already rightfully and exclusively attached in the state courts, which (as has been already shown) may occur. It must, therefore, extend by appellate jur-

Ap
po
fed
cou
ten
cas
sta
aff
fed
Co

[1] See above, p. 140.

isdiction, or not at all. It would seem to follow that the appellate power of the United States must, in such cases, extend to state tribunals; and if in such cases, there is no reason why it should not equally attach upon all others within the purview of the constitution.

The intention against this power denied.

It has been argued that such an appellate jurisdiction over state courts is inconsistent with the genius of our governments and the spirit of the constitution. That the latter was never designed to act upon state sovereignties, but only upon the people, and that if the power exists, it will materially impair the sovereignty of the states, and the independence of their courts. We cannot yield to the force of this reasoning; it assumes principles which we cannot admit, and draws conclusions to which we do not yield our assent.

The constitution does operate on states as such.

It is a mistake that the constitution was not designed to operate upon states, in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the states in some of the highest branches of their prerogatives. The tenth section of the first article contains a long list of disabilities and prohibitions imposed upon the states. Surely, when such essential portions of state sovereignty are taken away, or prohibited to be exercised, it cannot be correctly asserted that the constitution does not act upon the states. The language of the constitution is also imperative upon the states as to the performance of many duties. It is imperative upon the state legislatures to make laws prescribing the time, places, and manner of holding elections for senators and representatives, and for electors of President and Vice-President. And in these, as well as some other cases, Congress have a right to revise, amend, or supersede the laws which may be passed by state legislatures. When, therefore, the states are stripped of some of the highest attributes of sovereignty, and the same are given to the United States; when the legislatures of the states are, in some respects, under the control of Congress, and in every case are, under the Constitution, bound by the paramount authority of the United States; it is certainly difficult to support the argument that the appellate power over the decisions of state

courts is contrary to the genius of our institutions. The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the constitution, may declare them to be of no legal validity. Surely the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power. . . .

The desire for uniformity of federal decisions.

A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different States, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution. What, indeed, might then have been only prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils. . . .

115. *Jefferson's Criticism of the Supreme Court*

The three departments of government are equal and independent.

Jefferson claimed that the Supreme Court's exercise of power to pass on the constitutionality of statutes made it the supreme department in the federal government, and he attacked the position of the judiciary in the following manner: —

In denying the right they usurp, of exclusively explaining the constitution, I go further than you do, if I understand rightly your

quotation, from *The Federalist*, of an opinion that "the judiciary is the last resort in relation *to the other departments* of the government, but not in relation to the rights of the parties to the compact under which the judiciary is derived." If this opinion be sound, then indeed is our constitution a complete *felo de se.* For intending to establish three departments, co-ordinate and independent, that they might check and balance one another, it has given, according to this opinion, to one of them alone, the right to prescribe rules for the government of the others, and to that one too, which is unelected by, and independent of the nation. For experience has already shown that the impeachment it has provided is not even a scare-crow; that such opinions as the one you combat, sent cautiously out, as you observe also, by detachment, not belonging to the case often, but sought for out of it, as if to rally the public opinion beforehand to their views, and to indicate the line they are to walk in, have been so quietly passed over as never to have excited animadversion, even in a speech of any one of the body entrusted with impeachment.

If the judiciary are supreme the Constitution is merely wax in their hands.

The constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary which they may twist and shape into any form they please. It should be remembered, as an axiom of eternal truth in politics, that whatever power in any government is independent, is absolute also; in theory only at first, while the spirit of the people is up, but in practice, as fast as that relaxes. Independence can be trusted nowhere but with the people in mass. They are inherently independent of all but moral law. My construction of the constitution is very different from that you quote. It is that each department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the constitution in the cases submitted to its action; and especially, where it is to act ultimately and without appeal. I will explain myself by examples, which, having occurred while I was in office, are better known to me, and the principles which governed them. . . .

The judiciary of the United States is the subtle corps of sappers

and miners constantly working under ground to undermine the foundations of our confederated fabric. They are construing our constitution from a co-ordination of a general and special government to a general and supreme one alone. This will lay all things at their feet, and they are too well versed in English law to forget the maxim, "*boni judicis est ampliare jurisdictionem.*" . . . Having found, from experience, that impeachment is an impracticable thing, a mere scare-crow, they consider themselves secure for life; they skulk from responsibility to public opinion, the only remaining hold on them, under a practice first introduced into England by Lord Mansfield. An opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his mind, by the turn of his own reasoning. . . . A judiciary independent of a king or executive alone, is a good thing; but independence of the will of the nation is a solecism, at least in a republican government.

The government is laid at the feet of the judiciary.

116. *The Political Questions in Federal Cases* *

"The study of Constitutional Law," says Professor Thayer, "is allied not merely with history, but with statecraft and with the political problems of our great and complex national life." Indeed, most of the great cases which come before the Supreme Court involve questions of economic or social policy rather than law in the strict sense of the word. This fact is well demonstrated by the following extract from Mr. Choate's argument against the income tax delivered before the Supreme Court in 1894: —

I look upon this case with very different eyes from those of either the Attorney General or his associate who has just closed. I believe there are private rights of property here to be protected; that we have a right to come to this court and ask for their protection, and that this court has a right, without asking leave of the Attorney General or of any counsel, to hear our plea. The act of Congress which we are impugning before you is communistic in its purposes and tendencies, and is defended here upon principles

The income tax law is populistic.

as communistic, socialistic — what shall I call them — populistic as ever have been addressed to any political assembly in the world.

The communistic march must be stopped now.

Did your Honors observe what the learned counsel claimed, namely, that $20,000 might have been made the minimum of exemption of taxation of this law, and there would have been no help for it? If you approve this law, with this exemption of $4,000, and this communistic march goes on and five years hence a statute comes to you with an exemption of $20,000 and a tax of 20 per cent upon all having incomes in excess of that amount, how can you meet it in view of the decision which my opponents ask you now to render? There is protection now or never. If it goes out as the edict of this judicial tribunal that a combination of States, however numerous, however unanimous, can unite against the safeguards provided by the Constitution in imposing a tax which is to be paid by the people in four States or in three States or in two States, but of which the combination is to pay almost no part, while in the spending of it they are to have the whole control, it will be impossible to take any backward step. You cannot hereafter exercise any check if you now say that Congress is untrammelled and uncontrollable.

The protection of property a fundamental aim of all government.

I have thought that one of the fundamental objects of all civilized government was the preservation of the rights of private property. I have thought that it was the very keystone of the arch upon which all civilized government rests, and that this once abandoned, everything was at stake and in danger. That is what Mr. Webster said in 1820, at Plymouth, and I supposed that all educated, civilized men believed in that. According to the doctrines that have been propounded here this morning, even that great fundamental principle has been scattered to the winds.

The power to tax is not the power to confiscate.

It is not any part of our mission here to question the power of Congress to raise money by taxation. We believe that Congress has plenary power in the last exigencies of the government to reach every man, every dollar, every inch of ground, to secure the common defence and the general welfare; that it was the purpose of the convention that created the Constitution to give Congress

that power, and that it is one of the absolute essentials of a great sovereignty which was to cover a continent and to last for untold ages. There is no doubt about that. We are perfectly aware, too, of the difficulties that lie in our way; that it is necessary for us to show, in the first place, either that the power to pass this act was not conferred upon Congress or that in passing it Congress has exceeded the power entrusted to it by the Constitution. One thing is certain, absolutely certain, that although the power was given Congress to tax, no power was given it to confiscate; and that, the Attorney General and his associates all admit. If this is a confiscation under the forms of law, there is no power given to Congress in the Constitution that could by any possibility enable it to validly enact such a law. . . .

The equalization of taxes does not warrant the violation of the Constitution.

The Attorney General says in his brief, at page 83, that the rule of uniformity has been practically violated in the act of 1894, but that the law must be regarded not as standing alone but as a part of our general system of taxation, and that so regarded its effect is to bring about an approximation of equality of taxation. This is, as I understand it, an unequivocal admission that the law in itself is not equal or uniform in its operation, but that we may speculate that perhaps it works out uniformity of tax burden upon some theory or notion of compensation or equivalents. Has such a doctrine ever before been advanced in this court? It amounts to the claim on the part of the government that an act of Congress violating the Constitution and utterly lacking in uniformity may be upheld because some other act or the general tariff laws operate unequally. Is it true that under the Constitution you can compensate for intentional inequality of burden in one set of excises, duties, or imposts by imposing others which are inherently lacking in every essential element of uniformity? Is this court prepared to go that length and to enunciate any such construction of the Constitution? This is a doctrine worthy of a Jacobin club that proposed to govern France; it is worthy of a Czar of Russia proposing to reign with undisputed and absolute power; but it cannot be done under this Constitution.

The momentous importance of this decision.

But I have more than trespassed upon the kind indulgence of the court. I have felt the responsibility of this case as I have never felt one before and never expect to again. I do not believe that any member of this court ever sat or ever will sit to hear and decide a case the consequences of which will be so far-reaching as this — not even the venerable member who survives from the early days of the civil war, and has sat upon every question of reconstruction, of national destiny, of state destiny that has come up during the last thirty years. No member of this court will live long enough to hear a case which will involve a question of more importance than this, the preservation of the fundamental rights of private property and equality before the law, and the ability of the people of these United States to rely upon the guaranties of the Constitution. If it be true, as my friend said in closing, that the passions of the people are aroused on this subject, if it be true that a mighty army of sixty million citizens is likely to be incensed by this decision, it is the more vital to the future welfare of this country that this court again resolutely and courageously declare, as Marshall did, that it has the power to set aside an act of Congress violative of the Constitution, and that it will not hesitate in executing that power, no matter what the threatened consequences of popular or populistic wrath may be. With the deepest earnestness and confidence we submit that all patriotic Americans must pray that our views shall prevail. We could not magnify the scope of your decision, whatever it may be. No mortal could rise above "the height of this great argument."

117. *The Courts and Social Policy*

The connection between constitutional law and social policy is discussed in the following manner by President Roosevelt in a message to Congress.

The new conditions of our social and industrial life.

The rapid changes in our social and industrial life which have attended this rapid growth have made it necessary that, in applying to concrete cases, the great rules of right laid down in our Constitution, there should be a full understanding and appreciа-

tion of the new conditions to which the rules are to be applied. What would have been an infringement upon liberty half a century ago may be the necessary safeguard of liberty to-day. What would have been an injury to property then may be necessary to the enjoyment of property now. Every judicial decision involves two terms — one, an interpretation of the law; the other, the understanding of the facts to which it is to be applied. The great mass of our judicial officers are, I believe, alive to these changes of conditions which so materially affect the performance of their judicial duties. Our judicial system is sound and effective at core, and it remains, and must ever be maintained, as the safeguard of those principles of liberty and justice which stand at the foundation of American institutions; for, as Burke finely said, when liberty and justice are separated, neither is safe.

Techr liberty real li

There are, however, some members of the judicial body who have lagged behind in their understanding of these great and vital changes in the body politic, whose minds have never been opened to the new applications of the old principles made necessary by the new conditions. Judges of this stamp do lasting harm by their decisions, because they convince poor men in need of protection that the courts of the land are profoundly ignorant of and out of sympathy with their deeds, and profoundly indifferent or hostile to any proposed remedy. To such men it seems a cruel mockery to have any court decide against them on the ground that it desires to preserve "liberty" in a purely technical form, by withholding liberty in any real and constructive sense. It is desirable that the legislative body should possess, and wherever necessary exercise, the power to determine whether in a given case employers and employees are not on an equal footing, so that the necessities of the latter compel them to submit to such exactions as to hours and conditions of labor as unduly to tax their strength; and only mischief can result when such determination is upset on the ground that there must be no "interference with the liberty to contract" — often a merely academic "liberty," the exercise of which is the negation of real liberty.

he great rms of w have cial inter- retations.

The chief lawmakers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give direction to all law-making. The decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth-century economic and social philosophy and not to a long outgrown philosophy, which was itself the product of primitive economic conditions. Of course a judge's views on progressive social philosophy are entirely second in importance to his possession of a high and fine character; which means the possession of such elementary virtues as honesty, courage, and fairmindedness. The judge who owes his election to pandering to demagogic sentiments or class hatreds and prejudices, and the judge who owes either his election or his appointment to the money or the favor of a great corporation, are alike unworthy to sit on the bench, are alike traitors to the people; and no profundity of legal learning, or correctness of abstract conviction on questions of public policy, can serve as an offset to such shortcomings. But it is also true that judges, like executives and legislators, should hold sound views on the questions of public policy which are of vital interest to the people.

118. *The Place of the Supreme Court in Our System*

The American theory as to the function of the judiciary is thus admirably summed up by Mr. Sherley in a speech made in the House of Representatives: —

he upremacy f the udiciary n American lea.

We live under a peculiar government, due to its dual character and limited power. We have to determine in this country not only what we ought to do, but what we can do, because we have a government, limited both as to which sovereignty shall exercise

the power and limited also as to what matters can be dealt with at all. The one important original idea contained in the Constitution of the United States is the supremacy given to the judiciary. The thing that makes our constitution unique from every one in the world is the fact that the Supreme Court of the United States is given power to say whether the other branches of the government have exceeded their power; has the right to declare null and void an act of the legislature of the national Government; has the right to have disregarded the action of the executive when it is beyond his power; and has the further right to say when the states have exceeded their sovereign powers. That is the greatest power ever given to a tribunal and it is as I have said the one great characteristic of the American constitution, and to it we owe more of the stability and grandeur of this country than to any other provision in that instrument. . . .

The court is generally supported by the nation.

There have been times when the decisions of this court in the performance of its great functions have aroused great excitement and at times great indignation; but with the exception of the Dred Scott case nearly every decision of that court undertaking to lay down the limits of national and state power has met with the final approval of the American people; and to-day it may not be inappropriate when it has become the fashion of some of those in high places to criticise the judiciary, to call attention to these facts. Certainly, no man from my section of the country should ever care to utter a condemnation of the judiciary, for when passion ran riot, when men had lost their judgment, when the results of four years of bitter war produced legislation aimed not at justice, but frequently at punishment, it was the Supreme Court that stood between the citizen and his liberties and the passion of the hour [*applause*] and I trust the day will never come when the American people will not be willing to submit respectfully and gladly to the decrees of that august tribunal. Temporarily they may seem to thwart the will of the people but in their final analysis they will make as they have made for orderly government, for government of laws and not of men, and we may be sure that the

Supreme Court in the pure atmosphere of judicial inquiry that has always surrounded it will arrive at a better interpretation of the powers of both state and national governments than can be possibly hoped for in a forum like this where popular prejudice and the passions of the hour affect all of us whether we will or no.

CHAPTER XVI

FOREIGN AFFAIRS

119. *The Organization of the Department of State*

By giving the President the power to appoint our representatives abroad and to negotiate treaties in conjunction with the Senate, and also the right to receive the ambassadors and other public ministers of foreign countries, the federal Constitution has made him the official spokesman of the nation in dealing with other countries.[1] To aid the President in the discharge of the important duties connected with this position, Congress created in July, 1789, a Department of Foreign Affairs which, in September of the same year, was changed to the Department of State with a Secretary of State at its head. The duties of the Secretary, however, with regard to foreign matters, are still those laid down in the original statute: —

The Secretary of State and his duties.

There shall be at the seat of Government an Executive Department, to be known as the Department of State, and a Secretary of State who shall be the head thereof. . . .

The Secretary of State shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President, relative to correspondences, commissions or instructions to or with public ministers or consuls, from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs, as the President of the United States shall assign to the said Department; and furthermore he shall conduct the business of the Department in such manner as the President of the United States shall direct.

[1] See above, Chap. IX.

120. *Duties and Responsibilities of Diplomatic Representatives* *

The representation of the nation abroad is committed to the charge of two groups of officers: diplomatic and consular. It has often been contended that with the development of rapid means of communication, the maintenance of diplomatic representation has become an unnecessary luxury subserving no practical purposes,[1] but in the following paper, the Hon. Andrew D. White makes a strong argument in favor of continuing the custom by showing the important duties which still fall upon a diplomatic officer.

The abolition of the diplomatic service considered.

Some years since, a very eminent American journalist, in discussing our diplomatic service, proposed what he was pleased to call "a reform." His plan was exceedingly drastic. For it was nothing less than that the entire system be extirpated, root and branch, — in fact, "reformed off the face of the earth," and that in place of it, whenever our government should have any business with any other, it should seek out a suitable agent, make a fair bargain with him for his services, send him to attend to the matter, and then recall him as soon as he had finished it. Although this advice has often been cited as a piece of political wisdom, has lingered vaguely in the public mind, and has, indeed, been recently sanctioned by a very eminent American citizen, it seems not difficult to show that such a departure from the practice of the whole civilized world would be a misfortune, — not only to our country in general, but especially to our political, commercial, and financial interests.

The importance of having a trained man on the spot.

For in view of all the interests of our country, ever extending, ever becoming more complex, ever demanding more and more quick sight and prompt action, what is it that we need? Is it men to be sought and selected and passed upon and haggled with and sent across the ocean to see if, perhaps, they can mitigate serious and even disastrous international trouble after it has got under full headway? Is it not rather to have thoroughly trained men on the spot, who shall foresee trouble, prevent it, attenuate it,

[1] See Foster, *The Practice of Diplomacy*, p. 15.

disperse it, be in touch with the right men, know the right means, speak the right word, at the right moment, in the right quarter? Some years since, at Constantinople, I asked the cause of the widespread conflagrations which had so often devastated that capital. The answer was that the city had a very peculiar fire department — that when a fire broke out in any house, the proper and usual way was for its owner to seek someone who owned a hand fire engine, to find, by proper examination whether he was trustworthy, whether his helpers were robust, whether his fire apparatus was effective; and then to make a bargain with him and his helpers and conduct them to the fire. There was usually, so I was informed, not much trouble in finding the fire, for, by the time the machine had been approved and the firemen selected and bargained with and got to the spot, the conflagration was amply evident.

Assistance in making and modifying treaties.

A special reason for the maintenance of an organized diplomatic service is found in the need of making or modifying treaties. Here it is that a minister permanently residing at a foreign court has a decided advantage. He notes the progress of affairs, watches for opportunities, makes the acquaintance of statesmen and other men of influence in the country to which he is accredited, and thus is able to suggest and to secure treaties and modifications of treaties much earlier and more easily than could possibly be done from the centre of a distant government. Even if special commissioners be sent to make a treaty, a resident representative is sure to be of the utmost value.

The collection of important information.

Another duty of our foreign representatives is the collection of information bearing on large questions important to our country. Of this information, that which relates to the actions of foreign powers in anticipated crises is frequently of the utmost importance. Grant that our diplomats have not the prophetic gift, still at every time since the formation of this government, and never more than now, it has been of great importance to this country, politically and commercially, to have at various centres of information throughout the world, thinking men with access to the best sources of

news, who can constantly keep the home government advised as to the probable action of foreign powers. At this moment, when Europe is one great group of fortified camps and great changes are taking place in Asia and Africa, and troublesome questions are rising in South America, it cannot but be of immense value to our manufacturing, commercial, and indeed all other interests to have the best and most recent information regarding the outcome of warlike operations, the drift of public opinion, and settlements likely to be made; and such information is obtained by our representatives at the lesser capitals almost as frequently as at the greater.

Diplomatic reports on questions of public interest.

Then, too, there are other subjects of importance. Every year our State Department issues sundry volumes entitled "Diplomatic Relations." These are made up of selections from the dispatches of our representatives abroad. Among these are found not only dispatches on current international business, but valuable reports on leading subjects of public interest; and of these I may mention in recent times, reports on systems of finance in foreign countries, on their supply and management of their circulating medium; on the administration of cities; on government railway systems; on public museums, on educational institutions and the like. It may be said that the newspapers and magazines give us these; but the difficulty is that information thus supplied is too frequently sketchy and scrappy. I do not underrate the newspaper correspondent; he is one of the wonders of the world; but, after all, the diplomatic representative has certain decided advantages: he has easy access to men controlling every sort of institution, he can ask for interviews, information, documents and the like with every probability of obtaining them, and this is not the case with the great majority of unofficial persons.

The protection of American citizens abroad.

Another duty of a foreign representative of our country is to protect Americans within the country to which he is accredited. No doubt there are many in our own land who care little for this: it is very easy to say in an off-hand way, that if people go abroad as missionaries or for business, health or pleasure, they must take their chances; but as civilization has developed there has been evolved

a better feeling which I trust may become deep and permanent throughout the country, and that is that our citizens are to be fully protected in all parts of the world at any cost. The famous boast "I am a Roman citizen," which was the passport and armor of the Roman in any part of the world gives the idea of what ought to be the claim of the American citizen. Our own history in this respect has at times been creditable to us, but here too our mother country sets the world an example. Let any British subject in any part of the world be maltreated and immediately it is a matter of interest to the home government. The resident minister feels himself false to his duty, or, if he does not feel so, knows that he will surely be denounced by the press and in Parliament, if he be remiss in securing redress for any wrong thus committed.

Coöpera with the consuls.

Still another of the functions of an American diplomatic representative is to coöperate with the consuls of his government, promoting by all honorable means the interests of American agriculture, manufactures, and commerce. The value of this kind of service was amply shown by the late Townsend Harris in Japan. . . . To him, more than to any other man, is due the opening of Japan to the commerce of America and of the world. His high character and skill inspired a confidence which enabled him to make that great treaty which marks a new point of departure in modern civilization. . . .

121. *Expenses Connected with Ambassadorial Rank*

Until 1893, the United States was content to be represented abroad by the more modest official bearing the title of minister, but in that year the dignity of ambassador was established without any provision for larger salaries. The increased expense connected with the maintenance of this higher dignity has been the subject of great discussion in and out of Congress. The necessity of making adequate provision for our ambassadors is thus urged by Mr. Lodge in a speech made in the Senate in 1908.

The demand on the ambass

It is impossible practically for an ambassador to live in a small apartment in Paris or Berlin and transact the business of the govern-

ment of the United States as it ought to be transacted. The demands do not come simply from the court or the society in which he finds himself, but the demands made by his own people are very great indeed. They expect certain public receptions to be held on Washington's birthday and on the Fourth of July; they expect hospitality from the ambassador. The number of Americans who go to these great capitals in Europe is very large; it is said that there are sixty thousand Americans normally in London alone; and an ambassador cannot escape the expenditure of a large amount of money.

Government residences standardize the scale of living.

Now, Mr. President, if we give to our ambassadors their rent in addition to the salary they already have, it would certainly make living much easier for them; also it would give to the United States a definite place in the city; it would give the embassy a definite home; and it would establish what I consider a proper scale because it is not merely that an ambassador is forced, if he is a poor man, to live below the scale that he would like to adopt, but there are cases I have in mind where men of great wealth have taken houses and established a scale of living which puts the successor in a position of great embarrassment. At least we should secure that the successive American ambassadors to any one country should live in the same house and should maintain substantially the same scale. I do not think it is decent for a country as rich as the United States to send its ambassadors abroad as they are sent now, even if they have abundant money, to pass six months, a year or eighteen months in looking for a suitable place to house themselves.

Mr. Choate's story.

You have all heard the story of Mr. Choate and what he is reported to have said in a speech at a dinner. He said he wished to compliment the police of London; that on the night of his arrival in London it was very rainy. He was wandering about the streets and a policeman stopped him and said, "What are you doing here?" He said, "I am just wandering about the streets." The policeman said, "You must not do that; you must go home." "Why," said Mr. Choate, "I have no home; I am the American

ambassador." [*Laughter.*] That is an exaggerated way of stating what is an actual fact.

Poor n exclud from t service

The really serious thing to my mind is that the inevitable tendency of this perfectly inadequate salary is to compel the giving of these offices exclusively to men of great wealth. The average man, even a man who has got a fair income of his own, knowing what expenditure these places require, does not want to go there, and live in a "two pair back." If he is going to represent his country at all, he wants to do it properly and generously and as it should be represented, and men decline those places because they cannot face the great expense.

122. *The Negotiation of Treaties*

The power of making treaties "by and with the advice and consent of the Senate" is conferred on the President by the Constitution, but it is nowhere definitely stated that the necessity of having the advice and consent of the Senate requires the President to consult that body during the negotiation of any particular treaty. In the following paper, Mr. Lodge shows how the Senate has shared in the making of treaties from the beginning of our government: —

The ri of the Senate advise disapp negotia

The Senate, being primarily a legislative body, cannot in the nature of things initiate a negotiation with another nation, for they have no authority to appoint or receive ambassadors or ministers. But in every other respect, under the language of the Constitution and in the intent of the framers, they stand on a perfect equality with the President in the making of treaties. They have an undoubted right to recommend either that a negotiation be entered upon or that it be not undertaken, and I shall show presently that this right has been exercised and recognized in both directions. As a matter of course, the President would not be bound by a resolution declaring against opening a negotiation, but such a resolution passed by a two-thirds vote would probably be effective and would serve to stop any proposed negotiation, as we shall see was the case under President Lincoln. In the same way the Senate has the right to advise the President to enter upon

a negotiation, and has exercised this right more than once. Here, again, the President is not bound to comply with the resolution, for his power is equal and coördinate with that of the Senate, but such an action on the part of the Senate, no doubt, would always have due weight. That this right to advise or disapprove the opening of negotiations has been very rarely exercised is unquestionably true in practice, and the practice is both sound and wise; but the right remains none the less, just as the Constitution gave it, not impaired in any way by the fact that it has been but little used.

The right of the Senate to share in treaty making at any stage has always been fully recognized, both by the Senate and the Executive, not only at the beginning of the government, when the President and many Senators were drawn from among the framers of the Constitution and were, therefore, familiar with their intentions, but at all periods since. A brief review of some of the messages of the Presidents and of certain resolutions of the Senate will show better than any description the relations between the two branches of the treaty-making power in the United States, the uniform interpretation of the Constitution in this respect, and the precedents which have been established.

The right of the Senate to share in treaty making at any stage.

On August 21, 1789, President Washington notified the Senate that he would meet with them on the following day to advise with them as to the terms of a treaty to be negotiated with the Southern Indians. On August 22, in accordance with this notice, the President came into the Senate Chamber, attended by General Knox, and laid before the Senate a statement of the facts, together with certain questions, in regard to our relations to the Indians of the Southern district, upon which he asked the advice of the Senate. On August 24, 1789, he appeared again in the Senate Chamber with General Knox, and the discussion of our relations with the Southern Indians was resumed. The Senate finally voted on the questions put to it by the President, and in that way gave him their advice. . . .

Washington's practice.

President Arthur, on June 9, 1884, asked the advice of the Senate

as to directing negotiations in process with the King of Hawaii for the extension of the existing reciprocity treaty with the Hawaiian Islands. On March 3, 1888, the Senate passed a resolution asking President Cleveland to open negotiations with China for the regulation of immigration with that country. President Cleveland replied that such negotiations had been undertaken. From these various examples it will be seen that the Senate has been consulted at all stages of negotiations by Presidents of all parties, from Washington to Arthur. . . .

Later prece

The power of the Senate to amend or to ratify conditionally is of course included in the larger powers expressly granted by the Constitution to reject or to confirm. It would have never occurred to me that anyone who had read the Constitution and who possessed even the most superficial acquaintance with the history of the United States could doubt the right of the Senate to amend. . . .

The to an

Notwithstanding the general practice of coöperation between the President and Senate in the negotiation of treaties, Mr. Spooner ably contends that, as a matter of constitutional right, the Senate has no claim to interference in treaty negotiations: —

The words "advice and consent of the Senate" are used in the Constitution with reference to the Senate's participation in the making of a treaty and are well translated by the word "ratification" popularly used in this connection. The President negotiates the treaty, to begin with. He may employ such agencies as he chooses to negotiate the proposed treaty. He may employ the ambassador, if there be one, or a minister or a *chargé d'affaires*, or he may use a person in private life whom he thinks by his skill or knowledge of the language or people of the country with which he is about to deal is best fitted to negotiate the treaty. He may issue to the agent chosen by him — and neither Congress nor the Senate has any concern as to whom he chooses — such instructions as seem to him wise. He may vary them from day to day. That is his concern. The Senate has no right to demand that he shall unfold to the world or to it, even in executive session, his instructions,

The powe nego veste in th Presi

or the prospect or progress of the negotiation. I said "right." I use that word advisedly in order to illustrate what all men who have studied the subject are willing to concede — that under the Constitution the absolute power of negotiation is in the President and the means of negotiation subject wholly to his will and his judgment.

hen the nate's wer gins.

When he shall have negotiated and sent his proposed treaty to the Senate the jurisdiction of this body attaches and its power begins. It may advise and consent, or it may refuse. And in the exercise of this function it is as independent of the Executive as he is independent of it in the matter of negotiation.

he nate may press an inion.

I do not deny the power of the Senate either in legislative or in executive session — that is a question of propriety — to pass a resolution expressive of its opinion as to matters of foreign policy. But if it is passed by the Senate or by the House or by both Houses it is beyond any possible question purely advisory, and not in the slightest degree binding in law or conscience upon the President. It is easy to conceive of circumstances in which to pass in legislative session a resolution like that first introduced by my distinguished and learned friend, the Senator from Georgia (Mr. Bacon), asking the President, if in his opinion not incompatible with the public good, to transmit the correspondence in a pending negotiation to the Senate, might be productive of mischief. I think the Morocco case is perhaps one which could be productive of mischief in this, that the President's declination, which would be within his power, upon the ground that the public good required that the correspondence should not be sent to the Senate, might give rise to an inference in other countries that something with reference to one or more of the parties was being concealed from them. . . .

he position the oreign elations ommittee.

The relation of members of the Foreign Relations Committee to the executive department of the Government in its relation to foreign relations is precisely the relation which the Senator from South Carolina and his colleagues sustain to the executive department in its relation to foreign relations. The Committee on Foreign Relations, like the other committees of this body, is not an inde-

pendent entity. Its members are Senators who are designated by the body to study and report upon certain subjects and the committee is therefore but the servant of the Senate, as all other committees are. A member of the Foreign Relations Committee, as a Senator, in his relation to the Senate and executive department is only a Senator, just as those who are not on that committee are Senators. Of course it will sometimes happen that members of the Foreign Relations Committee, charged by the Senate with that particular subject, will obtain information as servants of the Senate, in order to bring it to the attention of the Senate, which other Senators might not seek; but that is all. . . .

The President is so supreme under the Constitution in the matter of treaties, excluding only the Senate's ratification, that he may negotiate a treaty, he may send it to the Senate, it may receive by way of "advice and consent" the unanimous judgment of the Senate that it is in the highest degree for the public interest, and yet the President is as free when it is sent back to the White House with a resolution of ratification attached to put it in his desk never again to see the light of day as he was free to determine in the first instance whether he would or would not negotiate it. That power is not expressly given to the President by the Constitution, but it inheres in the executive power conferred upon him to conduct our foreign relations, and it is a power which inheres in him as the sole organ under the Constitution through whom our foreign relations and diplomatic intercourse are conducted. Out of public necessity the President should be permitted to pocket a treaty, no matter if every member of the Senate thought he ought to exchange the ratification.

Why? Because the President, through the ambassadors, ministers, consuls, and all of the agencies of the Government, explores sources of information everywhere, it is his business to know whether anything has occurred since the Senate acted upon the treaty which would render it for the public interest that the ratifications be not exchanged. And he is empowered to withhold exchange of ratifications, if upon later knowledge he deems it for the public

interest to do so. The conduct of our foreign relations is a function which requires quick initiative, and the Senate is often in vacation. It is a power that requires celerity. One course of action may be demanded to-night, another in the morning. It requires also secrecy; and that element is not omitted by the commentators on the Constitution as having been deemed by the framers of the most vital importance. It is too obvious to make elaboration pardonable.

We ratified the arbitration treaty unanimously, I believe. The President, in the exercise of the power which no one can dispute, pocketed it. The President may negotiate and sign a proposed treaty, and not send it to the Senate. In such case what would be thought of a resolution asking him to inform the Senate whether he had negotiated such a proposed treaty, and why he had not sent it to the Senate? Having sent a treaty to the Senate, he may withdraw it the next day.

ıe Senate ght not to vade the esident's here of wer.

Mr. President, the three great coördinate branches of this Government are made by the Constitution independent of each other except where the Constitution provides otherwise. We have no right to assume the exercise of any executive power save under the Constitution. We can not assume judicial functions. The President may not assume judicial functions. The President may not assume legislative functions. We as the Senate, a part of the treaty-making power, have no more right under the Constitution to invade the prerogative of the President to deal with our foreign relations, to conduct them, to negotiate treaties, and that is not all — the conduct of our foreign relations is not limited to the negotiation of treaties — we have no more right under the Constitution to invade that prerogative than he has to invade the prerogative of legislation.

123. *The Recognition of a New Government*

The right of recognizing a new government or an independent state is an important one, for its exercise may involve an administration in serious difficulties with other countries or governments

concerned. The way in which recognition may be made and in which the Senate may bring pressure on the President is illustrated in this report made to the Senate by the committee on foreign relations in 1836.

How an independent power may be recognized.

The recognition of Texas as an independent power may be made by the United States in various ways: First, by treaty; second, by the passage of a law regulating commercial intercourse between the two powers; third, by sending a diplomatic agent to Texas with the usual credentials; or, lastly, by the Executive receiving and accrediting a diplomatic representative from Texas which would be a recognition as far as the Executive only is competent to make it. In the first and third modes the concurrence of the Senate in its executive character would be necessary, and in the second in its legislative character. The Senate alone, without the coöperation of some other branch of the Government, is not competent to recognize the existence of any power.

The President regularly should take the initiative

The President of the United States, by the Constitution, has the charge of their foreign intercourse. Regularly he ought to take the initiative in the acknowledgement of the independence of any new power, but in this case he has not yet done it, for reasons which he, without doubt, deems sufficient. If in any instance the President should be tardy, he may be quickened in the exercise of his power by the expression of the opinion, or by other acts, of one or both branches of Congress, as was done in relation to the republics formed out of Spanish America. But the committee do not think that on this occasion any tardiness is justly imputable to the Executive. About three months only have elapsed since the establishment of an independent Government in Texas, and it is not unreasonable to wait a short time to see what its operation will be, and especially whether it will afford those guarantees which foreign powers have a right to expect before they institute relations with it.

Taking this view of the whole matter, the committee conclude by recommending to the Senate the adoption of the following resolution:

Resolved, That the independence of Texas ought to be acknowledged by the United States whenever satisfactory information shall be received that it has in successful operation a civil government, capable of performing the duties and fulfilling the obligations of an independent power.

The general conditions under which the recognition of new governments should be made are thus discussed in a debate in the Senate in 1903 over the recognition of the republic of Panama: —

ow the hird rench epublic as recog- zed.

MR. FORAKER. In 1870 when the Republic of France was established, we recognized it immediately. We did not wait a day, or two days, nor three days, nor five days, or any other length of time. It was established one day. The date of our cablegram instructing Minister Washburne to recognize the Republic of France was dated the next day. That apparent delay of a day was only because of the difference in time. It was sent in the evening. It was already the next day when it got here and was answered. France had no constitution, but it was not a humming bird or any other thing of a diminutive character, but a great mighty people, forty millions or more, who had set up a republic dedicated to freedom and to human liberty, and this great republic at once responded with recognition.

MR. ALDRICH. We did not even ask France, as I remember, whether the government which had been overthrown consented.

MR. FORAKER. No. Now in 1873 they established a republic in Spain. There was no delay. Immediately our minister there, General Sickles, was advised by our government to recognize and he did recognize, the Republic of Spain. Later when the Emperor of Brazil was deposed, the republic that followed him was instantly recognized, and other examples might be cited. Mr. President, there was no reason in the case of France, or Spain, or Brazil for precipitate or hasty action; we had no special duties there; but in the case of the Republic of Panama it was different.

'hat are e condi- ɔns of cognition.

What are the conditions, according to international law, that are sufficient to justify us in instantly recognizing a new government

as we did in the case of France, Spain, and Brazil? The only condition necessary, — and it does not make any difference, in the language of the Senator from Massachusetts whether it be brought about in five minutes, or five days, or five months — is that the new government shall be the sole authority throughout the region over which it undertakes to govern, and that there is no contention and no disputed authority. It is not necessary to go that far. But when those conditions exist to that extent, then according to all canons of international law, a recognition is in order at the option of the recognizing government. In the case of France, I say, there was no special necessity for haste but these conditions existed as we understood and we recognized it. It was the same as to Spain, and the same as to Brazil in a general way.

124. *An Arbitration Treaty*

The United States has taken an important part in the two peace conferences at the Hague and in pursuance of the recommendations of the first conference has made arbitration treaties with most of the important powers of the world. The general tenor of all these treaties is illustrated by this treaty signed with Great Britain in 1908.

The President of the United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, desiring in pursuance of the principles set forth in articles 15–19 of the convention for the pacific settlement of international disputes, signed at the Hague July 22, 1899, to enter into negotiations for the conclusion of an arbitration convention, have named as their Plenipotentiaries to wit: The President of the United States of America, Elihu Root, Secretary of State of the United States, and His Majesty the King of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, The Right Honorable James Bryce, O. M., who, after having communicated to one another their full powers, found in good and due form, have agreed upon the following articles:

x

Article I

Character of differences to be adjusted.

Differences which may arise of a legal nature or relating to the interpretation of treaties existing between the two Contracting parties and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at the Hague by the convention of the 29th of July, 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two contracting States, and do not concern the interests of third parties.

Article II

Arrangements for fixing the scope of the arbitration.

In each individual case the High Contracting Parties, before appealing to the Permanent Court of Arbitration, shall conclude a special agreement defining clearly the matter in dispute, the scope of the powers of the arbitrators, and the periods to be fixed for the formation of the arbitral tribunal, and the several stages of the procedure. It is understood that such special agreements on the part of the United States will be made by the President of the United States, by and with the advice and consent of the Senate thereof; His Majesty's Government reserving the right before concluding a special agreement in any matter affecting the interests of a self-governing dominion of the British Empire to obtain the concurrence therein of the government of that dominion.

Such agreements shall be binding only when confirmed by the two governments by an exchange of notes.

Article III

Ratifications to be exchanged.

The present convention shall be ratified by the President of the United States of America by and with the advice and consent of the Senate thereof, and by His Britannic Majesty. The ratifications shall be exchanged at Washington, as soon as possible, and the convention shall take effect on the date of the exchange of its ratifications.

ARTICLE IV

The present convention is concluded for a period of five years dating from the day of the exchange of its ratifications.

Done in duplicate at the city of Washington, this fourth day of April, in the year 1908.

ELIHU ROOT (Seal)
JAMES BRYCE (Seal)

CHAPTER XVII

NATIONAL DEFENSE

125. *The National Militia*

UNDER the Constitution, Congress is authorized to raise and support armies, provide and maintain a navy, to provide for organizing, arming, and disciplining the militia and calling the militia into federal service, and to make rules for the government of the land and naval forces and of the militia when in the service of the United States. The sole express restriction on this military power of Congress is the provision limiting appropriations to a term of not more than two years. The direction of the forces, however, is committed to the President as commander-in-chief. The ultimate resource for the defense of the nation is the entire population of able-bodied males capable of bearing arms. This citizen army is organized by an important statute passed in 1903 and amended in 1908, from which two sections are given here.

'ho are the ilitia.

SEC. 1. That the militia shall consist of every able-bodied male citizen of the respective States and Territories, and the District of Columbia, and every able-bodied male of foreign birth who has declared his intention to become a citizen, who is more than eighteen and less than forty-five years of age, and shall be divided into two classes — the organized militia, to be known as the National Guard of the State, Territory, or District of Columbia, or by such other designations as may be given them by the laws of the respective States or Territories, and the remainder to be known as the Reserve Militia. . . .

rovision r call into deral rvice.

SEC. 4. That whenever the United States is invaded, or in danger of invasion from any foreign nation, or of rebellion against the authority of the Government of the United States, or the President is unable, with the regular forces at his command, to execute the laws of the Union, it shall be lawful for the President to call forth such number of the militia of the State or of the States or Territories or of the district of Columbia as he may deem neces-

[1] See above, p. 177.

sary to repel such invasion, suppress such rebellion, or to enable him to execute such laws, and to issue his orders for that purpose, through the Governor of the respective State or Territory, or through the commanding-general of the militia of the District of Columbia, from which State, Territory, or District such troops may be called, to such officers of the militia as he may think proper.

126. *The Organization of the Standing Army*

These sections from an act passed in 1901 to increase the efficiency of the permanent military establishment of the United States will serve to illustrate very well the elaborate fashion in which Congress must provide for the minutest details of the military organization: —

The army of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the approval of this act the Army of the United States, including the existing organizations, shall consist of fifteen regiments of cavalry, a corps of artillery, thirty regiments of infantry, one Lieutenant-General, six major-generals, fifteen brigadier-generals, an Adjutant-General's Department, an Inspector General's Department, A Judge-Advocate-General's Department, a Quartermaster's Department, a Subsistence Department, a Medical Department, a Pay Department, a Corps of Engineers, an Ordnance Department, a Signal Corps, the officers of the Record and Pension Office, the chaplains, the officers and enlisted men of the Army on the retired list, the professors, corps of cadets, the army detachments and band at the United States Military Academy, Indian scouts as now authorized by law, and such other officers and enlisted men as may hereinafter be provided for. . . .

A regiment of cavalry

SEC. 2. That each regiment of cavalry shall consist of one colonel, one lieutenant-colonel, three majors, fifteen captains, fifteen first-lieutenants; fifteen second-lieutenants, two veterinarians, one sergeant-major, one quartermaster-sergeant, one commissary sergeant, three squadron sergeants-major, two color sergeants with rank, pay, and allowances of squadron sergeant-

major, one band, and twelve troops organized into three squadrons of four troops each. . . . Each cavalry band shall be organized as now provided by law. Each troop of cavalry shall consist of one captain, one first lieutenant, one second lieutenant, one first sergeant, one quartermaster sergeant, six sergeants, six corporals, two cooks, two farriers and blacksmiths, one saddler, one wagoner, two trumpeters, and forty-three privates, the commissioned officers to be assigned from among those hereinbefore authorized: Provided that the President in his discretion may increase the number of corporals in any troop of cavalry to eight and the number of privates to seventy-six, but the total number of enlisted men authorized for the whole Army shall not at any time be exceeded.

[Here follow detailed provisions organizing the other branches of the Army of the United States.]

127. *The Declaration of War*

The power to declare war is vested by the Constitution in Congress, and the following act illustrates the manner in which this power is exercised: —

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, First. That war be, and the same is hereby, declared to exist, and that war has existed since the 21st day of April, A.D. 1898, including said day, between the United States of America and the Kingdom of Spain.

Second. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States and to call into the actual service of the United States the militia of the several States to such extent as may be necessary to carry this act into effect.

Approved April 25, 1898.

128. *The Call for Volunteers*

Before the formal declaration of war on Spain, President McKinley, acting under a joint resolution and an act of Congress, issued this proclamation calling for volunteers: —

Whereas a joint resolution of Congress was approved on the 20th day of April, 1898, entitled "Joint resolution for the recognition of the independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and government in the island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect;" and

Congress instructs the Presid to act.

Whereas by an act of Congress entitled "An act to provide for temporarily increasing the military establishment of the United States in time of war, and for other purposes," approved April 22, 1898, the President is authorized, in order to raise a volunteer army, to issue his proclamation calling for volunteers to serve in the Army of the United States:

Now, therefore, I, William McKinley, President of the United States, by virtue of the power vested in me by the Constitution and the laws, and deeming sufficient occasion to exist, have thought fit to call forth, and do hereby call forth, volunteers to the aggregate number of 125,000 in order to carry into effect the purpose of the said resolution, the same to be apportioned, as far as practicable, among the several States and Territories and the District of Columbia according to population and to serve for two years unless sooner discharged. The details for this object will be immediately communicated to the proper authorities through the War Department.

The call for 125,0 volunteer

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington, this 23d day of April, A.D. 1898, and of the Independence of the United States the one hundred and twenty-second.

(Seal.) WILLIAM MCKINLEY.

By the President:

JOHN SHERMAN,
Secretary of State.

129. *The Establishment of a Blockade*

One of the most effective instruments of war is the closure of the enemy's ports by blockade, and the power to establish a blockade is incidental to the general war powers. It is not specifically mentioned in the Constitution and presumably may be exercised by Congress or the President or by both in conjunction. On April 22, 1898, President McKinley issued the following proclamation: —

Authority for the action.

Whereas by a joint resolution passed by the Congress and approved April 20, 1898, and communicated to the Government of Spain, it was demanded that said Government at once relinquish its authority and government in the island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters, and the President of the United States was directed and empowered to use the entire land and naval forces of the United States and to call into the actual service of the United States the militia of the several States to such extent as might be necessary to carry said resolution into effect; and

Whereas in carrying into effect said resolution the President of the United States deems it necessary to set on foot and maintain a blockade of the north coast of Cuba, including all ports on said coast between Cardenas and Bahia Honda, and the port of Cienfuegos, on the south coast of Cuba:

The limits of the blockade.

Now, therefore, I, William McKinley, President of the United States, in order to enforce the said resolution, do hereby declare and proclaim that the United States of America have instituted and will maintain a blockade of the north coast of Cuba, including ports on said coast between Cardenas and Bahia Honda, and the port of Cienfuegos, on the south coast of Cuba, aforesaid, in pursuance of the laws of the United States and the law of nations applicable to such cases. An efficient force will be posted so as to prevent the entrance and exit of vessels from the ports aforesaid. Any neutral vessel approaching any of the said ports or attempting to leave the same without notice or knowledge of the establishment of such blockade will be duly warned by the commander of the blockading forces, who will indorse on her register the fact and the

date of such warning, where such indorsement was made; and if the same vessel shall again attempt to enter any blockaded port she will be captured and sent to the nearest convenient port for such proceedings against her and her cargo as prize as may be deemed advisable.

Neutral vessels lying in any of said ports at the time of the establishment of such blockade will be allowed thirty days to issue therefrom.

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington, this 22d day of April, A.D., 1898, and of the Independence of the United States the one hundred and twenty-second.

(Seal.) WILLIAM MCKINLEY.

By the President:

JOHN SHERMAN,
Secretary of State.

130. *The Direction of the War* *

The following extracts from an article in the *World's Work* describe the wonderful fashion in which war may be directed in all parts of the world from a single room at the White House: —

The equipment of the War Room

The Cuban War developed in the White House the novel institution known as the Telegraph and Cipher Bureau. President McKinley conceived the idea of this telegraph and telephone office for his personal use at the outbreak of the war. It is called the "War Room" because it formed the common channel through which was received and dispatched all the most important information about the opposing armies. The Bureau is an apartment the size of an ordinary drawing-room, containing the most improved modern apparatus for communicating quickly by telephone, telegraph or ocean cable with every accessible portion of the globe. The President, although Commander-in-Chief of the Army and of the Navy, was formerly unable to know exactly the progress of events at the seat of war. Battles were fought, campaigns planned

and carried into execution, and even surrenders were arranged without direct communication with the Chief Executive at every move; but President McKinley was enabled to direct from his office in the White House the operations of the army and navy in Cuba and Porto Rico.

How the President kept informed.

The "War Room" brought valuable and prompt information of the great strategic game played upon the waters of the Atlantic. While the press and the public were kept for weeks in suspense about the movements of Admiral Cervera's fleet and the intentions of its commander, the President, through secret agents in Europe, was possessed of accurate information disclosing the plans of the Spanish Government before its war vessels left the home port. The movements of the hostile squadron were marked day by day upon a great map on the wall, and in the secrecy of the "War Room" the President knew that the fleet was in the harbor of Santiago before the public was informed.

Communications with the front.

As the invading army advanced into Cuba, telegraph lines were constructed and the President was kept in touch with his commanders in the field. So perfect were the arrangements that he was able to communicate from Washington in less than twenty minutes with the officers on the firing line at Santiago. There were days when the President, the Secretary of War and the Secretary of the Navy sat for hours at the elbows of the telegraphers, directing in person the military operations thousands of miles distant. On the day which brought the occupation of Santiago the President stood before great maps on which were marked in contrasting colors the exact position of every detachment of the American and Spanish forces. When a flag of truce appeared at any of the enemy's outposts the anxious commander-in-chief was apprised of the fact within a few minutes. Had the slender metallic strand between the President and the powder-begrimed fighters in the trenches been a telephone instead of a telegraph line, he might almost have heard the thunder of the guns and listened to the cheers of the American soldiers as the red and yellow flags dropped from the ramparts.

This account of the steps taken by Lincoln and Stanton in preparation for the fateful battle of Gettysburg illustrates the manner in which the President and Secretary of War may coöperate in directing the military forces: —

Lincoln and Stanton counsel on the coming battle.

It was night in Washington. The President wore a gloomy face as he entered the War Department by the urgent request of Secretary Stanton. Neither spoke for a while. Mr. Lincoln at last said: "Stanton, you want to speak to me; you have something to communicate; let us calmly counsel with each other: I am ready to listen." The Secretary replied: "Yes, I do want to say something to you. I want to tell you the trouble that oppresses me at this time; I'll not mince words, for I feel you want to know the worst." "I do," said Mr. Lincoln; "speak out then, I'll be listener." Mr. Stanton in brief language told him that he dreaded the issue of the coming battle, with Lee's conscious ability and the animating spirit of his army, on the one side, and Hooker, the beaten general, commanding men who still remembered their defeat in Virginia on the other side. "In short," said Mr. Stanton, "I have not confidence in General Hooker, though his personal courage I do not question." "I don't disagree with you," said the President, but you recollect the old saying, 'While crossing a stream it is too late to swap horses.' Stanton, have you any other general to suggest?" He replied: "I have thought of General Sedgwick, but you know he will not accept. I have thought of others and arrived at the same conclusion. The best of them are not without detractors. There is one that I would suggest, General Meade, with whose record and ability I could find no fault; and as a Pennsylvanian he has patriotism enough to draw out all the latent energies of his nature. . . ." "Stanton, there is no time to be lost. You must have conceived a plan. If you can satisfy my judgment that this expedient will prove a master stroke, and lead to success, I will co-operate with you, and give it my approval." Secretary Stanton then detailed his plans. The orders and papers, all written out, were taken up seriatim and discussed, and the papers executed.

The plans carried into execution.

A locomotive engine was in readiness, fired up; orders were placed in the hands of a tried officer of the regular army, who had precise instructions how to proceed. The first was to go forward to the headquarters of General Meade who was ordered by a paper delivered to him to take command of the army; the second was to deliver to General Hooker orders which informed him that he was superseded by General Meade; and all conditions were fully arranged to give simultaneous intelligence to the corps and division commanders in the field, of the President's order for the change, so that immediate intelligence to all subordinate officers might be given to the soldiers under their command. These orders were announced and acquiesced in, and a new spirit wakened among the rank and file of the army. All the world knows the story of Gettysburg.

The lengths to which the President as Commander-in-Chief and his immediate subordinates at Washington may go in prescribing the exact movements of the army and navy in the war on land and sea must, of course, always be determined by circumstances. This order issued in connection with the Spanish-American war serves to illustrate the process of direction only in a very general way.

WAR DEPARTMENT, WASHINGTON, May 30, 1898.
(Sent in cipher, May 31, 1898, 2.30 A.M.)

Instructions to General Shafter to proceed to Cuba (1898).

Maj. Gen. William R. Shafter, Tampa, Fla.:

With the approval of the Secretary of War, you are directed to take your command on transports, proceed under convoy of the Navy to the vicinity of Santiago de Cuba, land your force at such place east or west of that point as your judgment may dictate, under the protection of the Navy, and move it on to the high ground and bluffs overlooking the harbor or into the interior, as shall best enable you to capture or destroy the garrison there; and cover the Navy as it sends its men in small boats to remove torpedoes, or with the aid of the Navy capture or destroy the Spanish fleet now reported to be in Santiago Harbor. You will use the utmost energy to accomplish this enterprize, and the Government relies upon

your good judgment as to the judicious use of your command, but desires to impress upon you the importance of accomplishing this object with the least possible delay. You can call to your assistance any of the insurgent forces in that vicinity, and make use of such of them as you think advisable to assist you, especially as scouts, guides, etc. You are cautioned against putting too much confidence in any persons outside of your troops. You will take every precaution against ambuscades or surprises or positions that may have been mined or are commanded by the Spanish forces. You will coöperate most earnestly with the naval forces in every way, agreeing beforehand upon a code of signals. Communicate your instructions to Admiral Sampson and Commodore Schley. On completion of this enterprize, unless you receive other orders or deem it advisable to remain in the harbor of Santiago de Cuba, reëmbark your troops and proceed to the harbor of Port de Banes, reporting by the most favorable means for further orders and future important service. This with the understanding that your command has not sustained serious loss and that the above harbor is safe for your transports and convoys. When will you sail?

By command of Major-General Miles:

H. C. CORBIN, Adjutant-General.

131. *Use of Troops in Domestic Disturbances*

In 1894, on the occasion of local disorders in Chicago in connection with a strike, President Cleveland employed federal troops and issued this proclamation to the citizens of Illinois: —

Reasons for action.

Whereas, by reason of unlawful obstructions, combinations and assemblages of persons, it has become impracticable, in the judgment of the President, to enforce, by the ordinary course of judicial proceedings, the laws of the United States within the State of Illinois, and especially in the city of Chicago within said State; and

Whereas, for the purpose of enforcing the faithful execution of the laws of the United States and protecting its property and removing obstructions to the United States mails in the State and

city aforesaid, the President has employed a part of the military forces of the United States: —

Rioters ordered to disperse.

Now, therefore, I, Grover Cleveland, President of the United States, do hereby admonish all good citizens, and all persons who may be or may come within the City and State aforesaid, against aiding, countenancing, encouraging, or taking any part in such unlawful obstructions, combinations, and assemblages; and I hereby warn all persons engaged in or in any way connected with such unlawful obstructions, combinations and assemblages to disperse and retire peaceably to their respective abodes on or before twelve o'clock noon of the 9th day of July instant. Those who disregard this warning and persist in taking part with a riotous mob in forcibly resisting and obstructing the execution of the laws of the United States, or interfering with the functions of the Government, or destroying or attempting to destroy the property belonging to the United States or under its protection, cannot be regarded otherwise than as public enemies.

Troops will act with firmness.

Troops employed against such a riotous mob will act with all the moderation and forbearance consistent with the accomplishment of the desired end; but the stern necessities that confront them will not with certainty permit discrimination between guilty participants and those who are mingling with them from curiosity and without criminal intent. The only safe course, therefore, for those not actually participating, is to abide at their homes, or at least not to be found in the neighborhood of riotous assemblages. While there will be no vacillation in the decisive treatment of the guilty, this warning is especially intended to protect and save the innocent.

132. *Use of Troops in Domestic Disasters*

The Report of the War Department in 1906 thus described the way in which federal soldiers were employed on the occasion of the great earthquake in San Francisco: —

On April 18, the city of San Francisco was visited by a series of earthquake shocks which demolished many buildings. This

was followed by a fire which, due to the rupturing of the principal water mains of the city, was soon beyond control. The disaster was so far-reaching and overwhelming that it was entirely beyond the capacity of the local authorities, and the United States forces in the vicinity, both of the Army and of the Navy, rendered immediate assistance. Authority was given to concentrate at San Francisco all forces within the Pacific Division, and later this force was supplemented by troops from other divisions, resulting in a final concentration of 2 regiments of cavalry, 15 companies of coast artillery, 5 batteries of field artillery, 5 regiments of infantry, and detachments of the engineer, signal, and hospital corps, and 132 additional officers.

Concentration of forces at San Francisco.

The following summary, taken in large part from a general order published early in July by the commanding general, Pacific Division, is a succinct statement of the general situation.

The work done by this force readily falls into two phases — the struggle to save the city of San Francisco from complete destruction by fire, and the succoring of more than 300,000 suffering and destitute people. The work of the Army and Marine Corps in the heart of the city, supplemented by the labors of the Navy along the water front, saved the residential western addition and practically all the wharves fronting the bay. The efforts of the troops from daybreak of April 18 to midnight of April 20 taxed to the utmost the physical strength, the nervous energy, and the good temper of every officer and man. Yet in this fearful disaster, with its accompanying confusion and excitement, no life was taken by any man of the Army or Navy.

Fighting fire.

The labor of relief, recognized as beyond the law and assumed by the division commander from a sense of obligatory public duty, became regular by the official call for troops. This duty necessitated the care of nearly 350,000 people, destitute in one way or another, in a city without local transportation, without food, with scant water, and without sanitary facilities, while about one-half its population had lost houses, clothing, furniture, and bedding. It likewise involved repression of theft and violence by the vicious,

General relief services.

non-interference with the liberty and acts of the ordinary citizen, discrimination in the distribution of food, enforcement of suitable sanitary methods, instruction in camp life, patient consideration and courteous deportment toward the homeless and destitute.

Commendable action of the soldiers.

The adaptability and resourcefulness shown by officers and men when dealing with novel and unprecedented conditions, their consideration and thoughtfulness in alleviating distress, their unvarying courtesy to all, and their uncomplaining devotion to the community and its interests are most commendable, and have exemplified anew the admirable attributes of the officers and men of our Army, which insure the successful application of its moral, intellectual, and physical powers to novel and difficult duties.

133. *The American Theory of National Defense**

In the following speech made in the Senate against the bill authorizing the increase of the standing army to the number of 100,000, Senator Teller thus voiced what is doubtless the general theory of the American people as to the desirability of relying upon able-bodied citizens rather than a paid regular soldiery as the best resource for defending the nation.

The burden of great standing armies.

I wish to say that my opposition to this bill is not because I think a hundred thousand men can destroy the liberties of this country, nor five hundred thousand, but because it establishes a principle contrary to a republican principle, which is that the fighting force of a republic is the great body of the people, and not a paid soldiery, called "regulars." Since the birth of the world, in all history, there has never been a time when the people were so pressed down and burdened by great armies and great army expenses as they are to-day. There are bigger armies now than when Napoleon fought the world. They are not in active service, but they are a weight upon the industries and upon the productive energies of the people. Russia, a country not rich, has 850,000 men in her army, and 3,500,000 that she can bring into the army. England, with 200,000 in her regular army, has now in the neigh-

bourhood of 400,000 men in the field. The total expenses for the armies of Europe alone in time of peace is enough to pay our interest-bearing debt every year.

Patriotism and a paid army.

Mr. President, I object to this bill. I object to it as calculated to injure and to destroy the patriotic impulse of the young men of the country, who want to be educated to believe that when there is danger they are the ones to confront it — the young men who should be taught to believe that a man is entitled to go into the Army when his country is assailed. He does not go into the Army for $15 a month, but he goes into it stimulated by patriotism and not by the hope of gain. You are going to say to all the young men, "You are not needed; it is folly to take an interest in military affairs, for we are going to fight our battles in the future with paid hirelings," whom we pick up frequently out of the very slums of Europe; men who are fighting machines, but are not thinking men.

The armies of the Civil War.

Mr. President, we had a great army in the field, a million men at one time on our side, and somewhat less on the other. Why were those two armies the best armies in the world that ever aggregated together? Simply because they were the brains and the patriotism of the country. There were, of course, some bounty jumpers and some foreigners, but the great battles were fought by the stalwart sons of American fathers and mothers, and that is where you have to go, unless you are to follow the European system and the European policy with a great standing army.

Glorious battles won by volunteers.

We have fought our battles, not with the Regular Army, but with the volunteers. The great battles of the revolution were fought by humble men of the country who were not regulars. The war of 1812, as will be discovered if anybody will take the pains to look, was won by volunteers, and the Mexican war was fought by volunteers and not by the regulars. The most glorious battles in the world, where the greatest heroism has been exhibited, where the greatest conflicts between men have taken place, have been fought, not by regulars, but by volunteers. It was the boys out of the shop, with the exception of the Old Guard, that fought for Napoleon on

many a bloody battlefield. It was not the regulars. He called upon the French people and they responded. Such has been the case in England. Such is the case with every liberty-loving people. You must rely upon the people, not upon an army. An army is a vain delusion. It may to-day be for you; it may be against you to-morrow.

CHAPTER XVIII

TAXATION AND FINANCE

134. *The Uniformity Rule Applied to Indirect Taxes*

THE general taxing power of Congress is subject to the two great limitations that indirect taxes must be uniform throughout the United States and direct taxes must be apportioned among the States according to population. The question of direct and indirect taxes and the uniformity rule were thus discussed by the Supreme Court in the case of Knowlton *v.* Moore reviewing the inheritance tax law enacted during the Spanish-American war.

Statement of the question.

The act of Congress of June 13, 1898, c. 448, which is usually spoken of as the War Revenue Act, (30 Stat. 448), imposes various stamp duties and other taxes. Sections 29 and 30 of the statute, which are therein prefaced by the heading "Legacies and Distributive Shares of Personal Property," provide for the assessment and collection of the particular taxes which are described in the sections in question [*i.e.*, inheritance taxes]. To determine the issues which arise on this record it is necessary to decide whether the taxes imposed are void because repugnant to the Constitution of the United States, and if they be valid, to ascertain and define their true import. . . .

It is asserted that it was decided in the income tax cases that, in order to determine whether a tax be direct within the meaning of the Constitution, it must be ascertained whether the one upon whom by law the burden of paying it is first cast, can thereafter shift it to another person. If he cannot, the tax would then be direct in the constitutional sense, and, hence, however obvious in other respects it might be a duty, impost, or excise, it cannot be levied by the rule of uniformity and must be apportioned. From this assumed premise it is argued that death duties cannot be shifted from the one

on whom they are first cast by law, and therefore they are direct taxes requiring apportionment.

The Constitution, not political economy, the guide in explaining the term "direct."

The fallacy is in the premise. It is true that in the income tax cases the theory of certain economists by which direct and indirect taxes are classified with reference to the ability to shift the same was adverted to. But this disputable theory was not the basis of the conclusion of the court. The constitutional meaning of the word direct was the matter decided. Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property. Secondly, that the tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned. These conclusions, however, lend no support to the contention that it was decided that duties, imposts and excises which are not the essential equivalent of a tax on property generally, real or personal, solely because of its ownership, must be converted into direct taxes, because it is conceived that it would be demonstrated by a close analysis that they could not be shifted from the person upon whom they first fall. The proposition now relied upon was considered and refuted in *Nicol v. Ames*, 173 U.S. 509, 515, where the court said:

The taxing power not to be obstructed by subtle distinctions.

"The commands of the Constitution in this, as in all other respects, must be obeyed; direct taxes must be apportioned, while indirect taxes must be uniform throughout the United States. But while yielding implicit obedience to these constitutional requirements, it is no part of the duty of this court to lessen, impede or obstruct the exercise of the taxing power by merely abstruse and subtle distinctions as to the particular nature of a specified tax, where such distinction rests more upon the differing theories of

political economists than upon the practical nature of the tax itself.

Practical results to be considered.

"In deciding upon the validity of a tax with reference to these requirements, no microscopic examination as to the purely economic or theoretical nature of the tax should be indulged in for the purpose of placing it in a category which would invalidate the tax. As a mere abstract, scientific or economical problem, a particular tax might possibly be regarded as a direct tax, when as a practical matter pertaining to the actual operation of the tax it might quite plainly appear to be indirect. Under such circumstances, and while varying and disputable theories might be indulged as to the real nature of the tax, a court would not be justified, for the purpose of invalidating the tax, in placing it in a class different from that to which its practical results would consign it. Taxation is eminently practical, and is, in fact, brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy."

Inheritance tax a duty or excise.

Concluding, then, that the tax under consideration is not direct within the meaning of the Constitution, but, on the contrary, is a duty or excise, we are brought to consider the question of uniformity.

Does the progressive feature violate the uniformity clause?

The contention is that because the statute exempts legacies and distributive shares in personal property below ten thousand dollars, because it classifies the rate of tax according to the relationship or absence of the relationship of the taker to the deceased, and provides for a rate progressing by the amount of the legacy or share, therefore the tax is repugnant to that portion of the first clause of section 8 of article 1 of the Constitution, which provides that "the duties, imposts and excises shall be uniform throughout the United States."

Two views of the uniformity rule.

On the one side, the proposition is that the command that duties, imposts and excises shall be uniform throughout the United States relates to the inherent and intrinsic character of the tax; that it

contemplates the operation of the tax upon the property of the individual taxpayer, and exacts that when an impost, duty or excise is levied, it shall operate precisely in the same manner upon all individuals; that is to say, the proposition is that "uniform throughout the United States" commands that excises, duties and imposts when levied, shall be equal and uniform in their operation upon persons and property in the sense of the meaning of the words equal and uniform, as now found in the constitutions of most of the States in the Union. The contrary construction is this: That the words "uniform throughout the United States" do not relate to the inherent character of the tax as respects its operation on individuals, but simply requires that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States; that is to say, that whenever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate. The two contentions then may be summarized by saying that the one asserts that the Constitution prohibits the levy of any duty, impost or excise which is not intrinsically equal and uniform in its operation upon individuals, and the other that the power of Congress in levying the taxes in question is by the terms of the Constitution restrained only by the requirements that such taxes be geographically uniform.

. . . By the result of an analysis of the history of the adoption of the Constitution it becomes plain that the words "uniform throughout the United States" do not signify an intrinsic but simply a geographical uniformity. We add that those who opposed the ratification of the Constitution clearly understood that the uniformity clause as to taxation imported but a geographical uniformity and made the fact a distinct ground of complaint. Thus in a report made to the legislature of Maryland by Luther Martin: "Though there is a provision that all duties, imposts, and excises shall be uniform — that is, to be laid to the same amount on the same articles in each state — yet this will not prevent Congress from having it in their power to cause them to fall very unequally and much heavier

on some states than on others, because these duties may be laid on articles but little or not at all used in some other states and of absolute necessity for the use and consumption in others."

135. *The Apportionment of Direct Taxes*

The obvious injustice of the rule requiring direct taxes to be apportioned among the states on the basis of population rather than wealth has prevented a frequent use of the power of Congress to lay such taxes. The manner in which it is done is illustrated by this extract from the law of 1861 raising war revenues: —

The apportionment.

SEC. 8. *And be it further enacted*, That a direct tax of twenty millions of dollars be and is annually laid upon the United States and the same shall be and is hereby apportioned to the states respectively in the manner following:

To the State of Maine, four hundred and twenty thousand eight hundred and twenty-six dollars.

To the State of New Hampshire, two hundred and eighteen thousand four hundred and six and two-thirds dollars.

To the State of Vermont, two hundred and eleven thousan and sixty-eight dollars. [Here follow all the other States and Territories in the Union with their respective apportionments.]

The tax to be laid on lands and improvements by federal officers.

SEC. 13. *And be it further enacted*, That the said direct tax laid by this act shall be assessed and laid on the value of all lands and lots of ground, with their improvements and dwelling houses, which several articles subject to taxation shall be enumerated and valued by the respective assessors [appointed by the President and Senate for each tax district in the Union] at the rate each of them is worth in money on the first day of April, eighteen hundred and sixty-two. . . .

Each state or territory may assume and collect its quota.

SEC. 53. *And be it further enacted*, That any State or Territory and the District of Columbia may lawfully assume, assess, collect, and pay into the Treasury of the United States the direct tax or its quota thereof, imposed by this act upon the State, Territory, or the District of Columbia, in its own way and manner, by and through its own officers, assessors, and collectors. . . .

136. *The Income Tax*

In 1895, the Supreme Court declared unconstitutional the federal income tax law passed by Congress the year before and in the conclusion of a lengthy opinion, Chief Justice Fuller laid down the following general principles.

The question stated.

We are now permitted to broaden the field of inquiry, and to determine to which of the two great classes a tax upon a person's entire income, whether derived from rents, or products, or otherwise, of real estate, or from bonds, stocks, or other forms of personal property, belongs; and we are unable to conclude that the enforced subtraction from the yield of all the owner's real or personal property, in the manner prescribed, is so different from a tax upon the property itself, that it is not a direct, but an indirect tax, in the meaning of the Constitution. . . .

Arguments on the merits of an income tax.

Elaborate argument is made as to the efficacy and merits of an income tax in general, as on the one hand, equal and just, and on the other, elastic and certain; not that it is not open to abuse by such deductions and exemptions as might make taxation under it so wanting in uniformity and equality as in substance to amount to deprivation of property without due process of law; not that it is not open to fraud and evasion and is inquisitorial in its methods; but because it is preëminently a tax upon the rich, and enables the burden of taxes on consumption and of duties on imports to be sensibly diminished. And it is said that the United States as "the representative of an indivisible nationality, as a political sovereign equal in authority to any other on the face of the globe, adequate to all emergencies, foreign or domestic, and having at its command for offence and defence and for all governmental purposes all the resources of the nation," would be "but a maimed and crippled creation after all," unless it possesses the power to lay a tax on the income of real and personal property throughout the United States without apportionment.

Income tax is a direct tax.

The power to tax real and personal property and the income from both, there being an apportionment, is conceded; that such a

tax is a direct tax in the meaning of the Constitution has not been, and, in our judgment, cannot be successfully denied; and yet we are thus invited to hesitate in the enforcement of the mandate of the Constitution, which prohibits Congress from laying a direct tax on the revenue from property of the citizen without regard to State lines, and in such manner that the States cannot intervene by payment in regulation of their own resources, lest a government of delegated powers should be found to be, not less powerful, but less absolute, than the imagination of the advocate had supposed.

Court has nothing to do with the desirability of the tax.

We are not here concerned with the question whether an income tax be or be not desirable, nor whether such a tax would enable the government to diminish taxes on consumption and duties on imports, and to enter on what may be believed to be a reform of its fiscal and commercial system. Questions of that character belong to the controversies of political parties, and cannot be settled by judicial decision. In these cases our province is to determine whether this income tax on the revenue from property does or does not belong to the class of direct taxes. If it does, it is, being unapportioned, in violation of the Constitution, and we must so declare.

Conclusion:

Our conclusions may, therefore, be summed up as follows:

First. We adhere to the opinion already announced, that, taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes.

Second. We are of opinion that taxes on personal property or on the income of personal property, are likewise direct taxes.

Third. The tax imposed by sections twenty-seven to thirty-seven, inclusive, of the act of 1894, so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation, all those sections, constituting one entire scheme of taxation, are necessarily invalid.

137. *The Constitutionality of the Protective Tariff*

There is no express warrant in the Constitution for the use of the taxing power to benefit any industries of the country or any class of persons, but Congress has been guided by the general spirit and intent of the Constitution rather than the positive letter of the law. The strict constructionist view of the taxing power is thus described in a paper prepared by Calhoun: —

The taxing power is for revenue purposes.

The General Government is one of specific powers, and it can rightfully exercise only the powers expressly granted, and those that may be necessary and proper to carry them into effect, all others being reserved expressly to the States or the people. It results, necessarily, that those who claim to exercise power under the Constitution, are bound to show that it is expressly granted, or that it is necessary and proper as a means to some of the granted powers. The advocates of the Tariff have offered no such proof. It is true that the third section of the first article of the Constitution authorizes Congress to lay and collect an impost duty, but it is granted as a tax power for the sole purpose of revenue, — a power in its nature essentially different from that of imposing protective or prohibitory duties. Their objects are incompatible. The prohibitory system must end in destroying the revenue from imports.

Violation of the spirit and letter considered.

It has been said that the system is a violation of the spirit, and not the letter of the Constitution. The distinction is not material. The Constitution may be as grossly violated by acting against its meaning as against its letter; but it may be proper to dwell a moment on the point in order to understand more fully the real character of the acts under which the interest of this, and other States similarly situated, has been sacrificed. The facts are few and simple. The Constitution grants to Congress the power of imposing a duty on imports for revenue, which power is abused by being converted into an instrument of rearing up the industry of one section of the country on the ruins of another. The violation, then, consists in using a power granted for one object to advance

another, and that by the sacrifice of the original object. It is, in a word, a violation by perversion, — the most dangerous of all because the most insidious and difficult to resist. . . .

138. *Social Implications of the Taxing Power*

Some of the ways in which the taxing power may be used to benefit certain classes of the community so that the general level of civilization may be raised are suggested by President Roosevelt in his message of December, 1907: —

The income tax.

When our tax laws are revised the question of an income tax and an inheritance tax should receive the careful attention of our legislators. In my judgment both of these taxes should be part of our system of Federal taxation. I speak diffidently about the income tax because one scheme for an income tax was declared unconstitutional by the Supreme Court; while in addition it is a difficult tax to administer in its practical working, and great care would have to be exercised to see that it was not evaded by the very men whom it was most desirable to have taxed, for if so evaded it would, of course, be worse than no tax at all; as the least desirable of all taxes is the tax which bears heavily upon the honest as compared with the dishonest man. Nevertheless, a graduated income tax of the proper type would be a desirable feature of Federal taxation, and it is to be hoped that one may be devised which the Supreme Court will declare constitutional.

The inheritance tax.

The inheritance tax, however, is both a far better method of taxation, and far more important for the purpose of having the fortunes of the country bear in proportion to their increase in size a corresponding increase and burden of taxation. The Government has the absolute right to decide as to the terms upon which a man shall receive a bequest or devise from another, and this point in the devolution of property is especially appropriate for the imposition of a tax. Laws imposing such taxes have repeatedly been placed upon the National statute books and as repeatedly declared constitutional by the courts, and these laws contained

the progressive principle, that is, after a certain amount is reached the bequest or gift, in life or death, is increasingly burdened and the rate of taxation is increased in proportion to the remoteness of blood of the man receiving the bequest.

Foreign experience.

These principles are recognized already in the leading civilized nations of the world. In Great Britain all the estates worth $5,000 or less are practically exempt from death duties, while the increase is such that when an estate exceeds five millions of dollars in value and passes to a distant kinsman or stranger in blood the Government receives all told an amount equivalent to nearly a fifth of the whole estate. In France so much of an inheritance as exceeds $10,000,000 pays over a fifth to the State if it passes to a distant relative. The German law is especially interesting to us because it makes the inheritance tax an imperial measure, while allotting to the individual States of the empire a portion of the proceeds and permitting them to impose taxes in addition to those imposed by the Imperial Government. Small inheritances are exempt, but the tax is so sharply progressive that when the inheritance is still not very large, provided it is not an agricultural or a forest land, it is taxed at the rate of 25 per cent. if it goes to distant relatives. There is no reason why in the United States the National Government should not impose inheritance taxes in addition to those imposed by the States, and when we last had an inheritance tax about one-half of the States levied such taxes concurrently with the National Government, making a combined maximum rate, in some cases as high as 25 per cent. The French law has one feature which is to be heartily commended. The progressive principle is so applied that each higher rate is imposed only on the excess above the amount subject to the next lower rate; so that each increase of rate will apply only to a certain amount above a certain maximum. The tax should if possible be made to bear more heavily upon those residing without the country than within it.

Purpose of the tax.

A heavy progressive tax upon a very large fortune is in no way such a tax upon thrift or industry as a like tax would be on a small

fortune. No advantage comes either to the country as a whole or to the individuals inheriting the money by permitting the transmission in their entirety of the enormous fortunes which would be affected by such a tax; and as an incident to its function of revenue raising, such a tax would help to preserve a measurable equality of opportunity for the people of the generations growing to manhood. . . . Our aim is to recognize what Lincoln pointed out: The fact that there are some respects in which men are obviously not equal, but also to insist that there should be an equality of self-respect and of mutual respect, an equality of rights before the law, and at least an approximate equality in the conditions under which each man obtains the chance to show the stuff that is in him when compared to his fellows.

139. *Preparation of a Revenue Bill*

A slight notion of the difficult task which devolves upon the committee of ways and means and its chairman in the preparation of a general tariff act is given in the following interesting extract from the memoirs of Mr. Dingley: —

Republican members take the initiative.

The preparation of the Dingley tariff bill began on the evening of December 10, . . . when the Republican members of the ways and means committee met in the committee room and voted "to begin a tariff bill and have it ready for an extra session of congress." . . .

The Committee Room.

The room of the committee on ways and means in the National house in December, 1896, when the preparation of the Dingley tariff bill was begun, was the largest and most commodious in the capitol. The library had about four thousand volumes covering very completely the subjects of tariff and finance. An open fireplace and inviting easy chairs, made this committee room a general reception room for those desiring private conferences with prominent members of congress. Chairman Dingley was sought after more than any other member of congress, unless it was the speaker; and he always received all with uniform courtesy. In

the center of the room stood a large table around which were arranged 17 chairs. Along the edge of the table directly in front of each chair, was a small silver plate on which was engraved the name of the member of the committee occupying the seat. Chairman Dingley sat at the head of the table farthest from the door with Sereno E. Payne of New York on his right and John Dalzell of Pennsylvania on his left. . . .

Hearings on the tariff.

The series of tariff hearings by the committee on ways and means began December 28 and closed January 11. The committee room was crowded at every hearing, and representatives of all the leading lines of industry were present. Chairman Dingley presided over these hearings, listening to and commenting on the mass of testimony.

Preparing the first draft.

Wednesday, January 13, the Republican members of the committee began the framing of the tariff bill, in rooms they had engaged at the Cochran hotel, immediately opposite the Hamilton house, — centrally located and convenient to the chairman. It took two weeks and two days to complete the first draft of the Dingley tariff bill, and get the printed copies ready for congress. The Republican members of the committee worked almost uninterruptedly during this period in the preparation of the bill. It was a tremendous task. Schedule by schedule, paragraph by paragraph, the entire bill was constructed with great care and precision. Mr. Dingley was the guiding spirit, all yielding to his judgment, knowledge and tact. During these conferences various interests often clashed, but the chairman was always ready with some compromise or plan of procedure that seemed to satisfy all. With rare shrewdness he succeeded in adjusting all differences and in harmonizing the several parts of this important measure. His associates had implicit confidence in him and regarded him as students regard a wise and noble instructor.

Duty on kindling wood.

Many amusing events transpired during the preliminary preparation of the Dingley tariff bill, some of them at the expense of the chairman, who was always so absorbed in the seriousness of his work as to forget the humorous side of life. Mr. Dingley, it

is related, was very anxious to have a duty on kindling wood. Most of the members associated kindling wood with their wood piles at their back doors and were inclined to poke fun at the chairman. They were not aware of the fact that in many of the northern states there was a regular industry of manufacturing kindling wood and putting it on the market in bundles. Mr. Dingley proceeded to argue in favor of a duty on this article and took seriously the objections raised by some of the members who objected in a spirit of pure fun. But the duty on kindling wood was agreed to.

Duty on shoe string

Shortly afterwards, Mr. Tawney of Minnesota, became interested in a duty on enamelled shoe strings. So one morning he asked to have the schedule which he had prepared, considered by the Republican members. The chairman, who was overwhelmed with requests and anxious to complete the first draft of the bill, said, perhaps with some haste: "We have no time now for such trifling matters." Mr. Tawney with more spirit than he now wishes he had displayed, replied: "Mr. Chairman, I think shoe strings are as important as kindling wood." The other members including the chairman joined in a hearty laugh and proceeded to consider other sections of the bill.

The three leaders.

Chairman Dingley sat at the head of the table, Mr. Payne on his right and Mr. Dalzell on his left. These three men were the Republican triumvirate in the preparation of the first draft of the bill. So great was the chairman's confidence in the judgment of these two men, that he unconsciously conferred with them alone, and in a low voice on the rates to be agreed upon, and in a quiet way would say: "If there is no objection it will be the sense of the committee that the rate of duty on such and such an article shall be so and so."

A mild jo on the chairman.

Some of the younger Republican members at the foot of the table, while having implicit confidence in the chairman and his two leading associates, conspired to play a mild joke on the chairman. They agreed to object and vote down the chairman on some minor matter the next time the chairman talked in a low tone to Messrs. Payne and Dalzell, and put the question. The three

heads came together in close consultation and the chairman in his accustomed manner without looking up from the table said: "If there is no objection the committee will agree upon a duty of 60 per cent." Mr. Tawney said: "Mr. Chairman, we object and ask for a vote." "Well, well," said the chairman, looking over the top of his eye glasses with a surprised look on his face, — "of course we can take a vote if it is so desired." "We desire it," said Mr. Tawney. The vote was taken and the motion defeated, much to the chairman's amazement. The mischievous members of the committee laughed and explained their joke with the suggestion that the triumvirate occasionally take cognizance of the physical presence of the other Republican members. . . .

When the matter of imposing a duty on Angora goat hair was completed the chairman heaved a sigh of relief and said: "There, that disposes of the goat." "Yes," said Mr. Dolliver, "but the importers in six months will make another goat."

he
iairman's
astery
the
tuation.

Mr. Dingley's accurate knowledge of tariff schedules, rates and classifications was the marvel of his associates; and of all who conferred with him relative to proposed duties. His mind was a reservoir of facts and figures which he marshaled as a general marshals his soldiers — by companies and battalions. Thousands of suggestions, verbally and by letter were given him, and figures and percentages and claims were presented until any ordinary mind would have been hopelessly confused. But from this mass he was able to discern unerringly the true and the false, and to pluck out the kernel of the whole thing. His parlor at the Hamilton house was the headquarters of all interested in tariff legislation. His desks and tables were covered with books, papers, pads with figures, official documents and newspapers. Experts in certain lines of business called upon him to make suggestions, and were amazed to learn that the chairman of the committee knew all about their particular industry — the process of manufacture and the technical terms. . . .

he bill
ported to
ie House.

On the 18th of March the ways and means committee by a party vote ordered the chairman to report the tariff bill. That

evening before the fire in his private apartments at the Hamilton house, Mr. Dingley with remarkable speed, wrote with a pencil on a pad, the famous report which accompanied the tariff bill on the following day. In this report, Mr. Dingley pointed out that "for nearly four years the revenue has been inadequate to meet the current expenditures and pay the interest on the war debt. This clearly justifies the convention of congress to devise a prompt and adequate remedy. Nearly two hundred and three million dollars of the two hundred and ninety-three million dollars of borrowed gold have been used to supply an insufficiency of revenue." He showed how the tariff of 1890 was practically nullified by anticipated reduction of duties in 1892 and 1893. He added that "an imperative duty resting on this congress is to so adjust duties in a revision of the tariff as to secure needed revenue to carry on the government and to protect the many industries which have so seriously suffered in the past three years from unequal foreign competition, and from the consequent loss of purchasing power of the masses of the people upon which the demand for products and the prosperity of every citizen depend."

Mr. Dingley was loudly applauded when on the following day he reported the tariff bill to the house. It was agreed to begin debate March 22 and to have the final vote March 31.

140. *An Extract from the Dingley Tariff Act*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That on and after the passage of this Act, unless otherwise specially provided for in this Act, there shall be levied, collected and paid upon all articles imported from foreign countries and mentioned in the schedules herein contained, the rates of duty which are, by the schedules and paragraphs, respectively prescribed, namely:

Schedule A. — Chemicals, Oils, and Paints.

1. Acids: Acetic or pyroligneous acid, not exceeding the

specific gravity of one and forty-seven one-thousandths, three-fourths of one cent per pound; exceeding the specific gravity of one and forty-seven one-thousandths, two cents per pound; boracic acid, five cents per pound; chromic acid and lactic acid, three cents per pound; citric acid, seven cents per pound; salicylic acid, ten cents per pound; sulphuric acid or oil of vitrol not specially provided for in this act, one fourth of one cent per pound; tannic acid or tannin, fifty cents per pound; gallic acid, ten cents per pound; tartaric acid, seven cents per pound; all other acids not specially provided for in this Act, twenty-five per centum ad valorem.

2. All alcholic perfumery, including cologne water and other toilet waters and toilet preparations of all kinds, containing alcohol or in the preparation of which alcohol is used, and alcoholic compounds not specially provided for in this Act, sixty cents per pound and forty-five per centum ad valorem. . . .

[Here follow the remaining schedules: B. Earths, Earthenware, and Glassware; C. Metals and Manufactures of; D. Wood and Manufactures thereof; E. Sugar, Molasses and Manufactures thereof; F. Tobacco and Manufactures thereof; G. Agricultural Products and Provisions; H. Spirits, Wines, and other Beverages; I. Cotton Manufactures; J. Flax, Hemp, Jute and Manufactures of; K. Wool and Manufactures of Wool; L. Silk and Silk Goods; M. Pulp, Papers, and Books; N. Sundries.]

141. *Obtaining Estimates for Appropriations*

The bewildering details to be secured in preparing a single item of appropriation are shown in this testimony by Mr. Putnam, Librarian of Congress, and by Mr. Green, taken in a hearing of a committee charged with the consideration of appropriations for the Library.

'he salaries ' stenog- ıphers and 'pewriters.

MR. LITTAUER. Now, as to matters of detail, in the general administration of your own office, you have two stenographers and typewriters, at $1,000 each. Do you find necessity for two?

MR. PUTNAM. I am using three all through this period of the season.

MR. LITTAUER. What work requires so much stenographic employment?

MR. PUTNAM. Of ordinary letters passing through the office we have about 30,000 a year from all over the country.

MR. BRICK. What are they about?

The ext of the correspo ence.

MR. PUTNAM. More and more we are becoming a sort of bureau of information for people throughout the country, especially on bibliographic subjects. People write to us for bibliographic information, as to whether there is in the library material on certain subjects, or where it may be found. It is bibliographic information that we feel called upon to give. There are about 10,000 of those. That disposes of about a third of our correspondence; and we are in constant communication with the libraries throughout the country, of course, upon matters of library administration in which we are all interested. There is a correspondence, constantly going on in connection with applications, and so on. Then there is miscellaneous correspondence regarding the solicitation of material, and so on. This correspondence, however, is independent of that which goes on in every division of the Library. This is for my office alone.

MR. TAWNEY. These 30,000 letters pass through your office alone?

MR. PUTNAM. Yes.

MR. BRICK. That swells the force, and also makes it necessary to attend to that correspondence?

MR. PUTNAM. Yes. Many letters are written merely for the transmittal of memoranda compiled in another division of the Library. We may be called upon to say whether a certain map corresponds with some official or historic map that may be mentioned, and we send that inquiry to the map division, and they forward the data from which the answer is prepared. It is a large correspondence.

MR. LIVINGSTON. Now, let us come down to business on that

Estimates on a day's work.

proposition, Mr. Putnam. Thirty thousand letters a year is 2,500 a month, and 92 letters a day, divided between three stenographers. That would be thirty letters for each one per day. Do you think that is a good day's work?

MR. PUTNAM. That is part of their work only. I think it would be a very good day's work on letters of more than one page each; but of course they are attending also to the records in my office and to miscellaneous work besides that. One of them has to handle correspondence that comes in relative to remittances for our card distribution. Then they have to index the letter books, and keep the files, and so on. When a Senator writes to us about a transaction and refers to it a year later, he wants us to be able to refer to the correspondence immediately.

MR. LITTAUER. Where do you get the third stenographer from?

MR. PUTNAM. The special roll, generally. We have an allowance of $2,000 a year to be expended in special temporary service.

MR. LIVINGSTON. What is the chief stenographer's salary?

MR. PUTNAM. The law provides two stenographers and typewriters, to receive $1,000 each. . . .

The annual coal bill.

MR. TAWNEY. How much fuel do you purchase under this appropriation?

MR. GREEN. About 3,400 tons or 3,500 tons, I should think, I bought this year.

Mr. TAWNEY. Where did you get it?

MR. GREEN. From the dealers in town here. We advertise for it every year.

MR. TAWNEY. Is there any competition in bids?

MR. GREEN. Oh, yes. We advertise in the newspapers. We get all that come, sometimes four, and sometimes six or eight.

MR. TAWNEY. What do you pay a ton?

MR. GREEN. I do not recollect exactly what it is this year, but it is something like $5.30 — something like that.

MR. TAWNEY. Is that delivered at the Library?

MR. GREEN. Yes; delivered and dumped into our vaults.

MR. LIVINGSTON. Are these bids straight or do they contain rebates?

MR. GREEN. They are straight; there are no rebates.

MR. TAWNEY. How many tons did you say?

MR. GREEN. I think this year it amounts to 3,500 tons. It makes the total expenditure for that something like $17,000 out of $32,500 that we got.

Congress often obtains estimates for appropriations for specific objects by directing joint resolutions to some executive officer in the following manner: —

Resolved by the Senate (the House of Representatives concurring), That the Secretary of War be directed to transmit to the Senate an estimate of the cost of deepening the channel of Curtis Bay, Baltimore Harbor, in Maryland, to thirty feet, and widening the channel to two hundred and fifty feet; and also an estimate of the cost of increasing the depth of the main ship channel of the Patapsco River and Baltimore Harbor to thirty-five feet and the width thereof to one thousand feet.

Passed the Senate January 19, 1901.

Passed the House of Representatives January 22, 1901.

142. *Extract from an Appropriation Bill*

This brief extract illustrates the manner in which Congress may go into very specific details in making appropriations: —

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and the same are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, in full compensation for the service of the fiscal year ending June thirtieth, nineteen hundred and seven, for the objects hereinafter expressed namely: . . .

For compensation of the President of the United States, fifty thousand dollars.[1]

For compensation of the Vice-President of the United States, eight thousand dollars.[2]

[1] Now $75,000 per annum.

[2] Now $12,000 per annum.

For compensation to the following in the office of the President of the United States: Secretary, five thousand dollars, two assistant secretaries, at three thousand dollars each; executive clerk, two thousand five hundred; executive clerk and disbursing officer, two thousand dollars; seven clerks at two thousand dollars each; one clerk of class four; one clerk, of class four who shall be a telegrapher; four clerks of class three; one clerk of class two; steward, one thousand eight hundred dollars; chief door keeper, one thousand eight hundred dollars; eight door keepers at one thousand two hundred dollars each; four messengers at one thousand two hundred dollars each; five messengers at nine hundred dollars each; watchman, nine hundred dollars; one fireman, laborer, seven hundred and twenty dollars; laborer, six hundred dollars; in all sixty-six thousand three hundred and forty dollars: *Provided*, That employees of the Excutive Departments and other establishments of the executive branch of the Government may be detailed from time to time to the office of the President of the United States for such temporary assistance as may be necessary.

Contingent expenses.

For contingent expenses of the Executive Office, including stationery therefor, as well as record books, telegrams, telephones, books for library, furniture and carpets for offices, care of office carriages, horses, and harness, and miscellaneous items, to be expended in the discretion of the President, twenty thousand dollars. . . .

CHAPTER XIX

THE REGULATION OF COMMERCE

143. *Constitutional Provisions*

THE following clauses of the federal Constitution especially relate to the regulation of commerce by Congress: —

The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department, or officer thereof. (Art. I, sec. 8.)

No tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to, or from, one state be obliged to enter, clear, or pay duties in another. (Art. I, sec. 9.)

The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. (Art. IV, sec. 2.)

No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. (Amendment XIV, sec. 1.)

144. *Judicial Interpretation of the Term "Commerce"*

The first great judicial construction of the term "Commerce" was made in 1824 by Chief Justice Marshall in the case of Gibbons *v.* Ogden. The opinion rendered on that occasion, from which

only a brief extract can be given here, "is the basis of all subsequent decisions construing the commerce clause, and is the recognized source of authority."

Commerce is more than traffic; it is intercourse.

The words are: "Congress shall have power to regulate commerce with foreign nations, and among the several states and with the Indian tribes." The subject to be regulated is commerce: and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce undoubtedly is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

Commerce embraces navigation.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their govern-

ment and must have been contemplated in forming it. The convention must have used the word in that sense; because all have understood it in that sense, and the attempt to restrict it comes too late. . . .

The universally acknowledged power of the government to impose embargoes, must also be considered as showing that all America is united in that construction which comprehends navigation in the word commerce. Gentlemen have said, in argument, that this is a branch of the war-making power, and that an embargo is an instrument of war, not a regulation of trade. That it may be, and often is, used as an instrument of war cannot be denied. An embargo may be imposed for the purpose of facilitating the equipment or manning of a fleet, or for the purpose of concealing the progress of an expedition preparing to sail from a particular port. In these, and in similar cases, it is a military instrument, and partakes of the nature of war. But all embargoes are not of this description. They are sometimes resorted to without a view to war, and with a single view to commerce. In such a case, an embargo is no more a war measure than a merchantman is a ship of war, because both are vessels which navigate the ocean with sails and seamen. When Congress imposed that embargo which, for a time, engaged the attention of every man in the United States, the avowed object of the law was the protection of commerce, and the avoiding of war. By its friends and its enemies it was treated as a commercial, not as a war measure. . . . The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

The
to lay
emba

To what commerce does this power extend? The constitution informs us, to commerce "with foreign nations, and among the several states, and with the Indian tribes." It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this

Every
specie
comm
interc
embr

country and any other, to which this power does not extend. It has been truly said, that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term. If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

he term among" nsidered.

The subject to which the power is next applied, is to commerce "among the several states." The word "among" means intermingled with. A thing which is among others is intermingled with them. Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient and is certainly unnecessary.

raffic holly ithin a ate not cluded.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made had the intention been to extend the power to every description. . . . The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.

But, in regulating commerce with foreign nations, the power

of Congress does not stop at the jurisdictional lines of the several states. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every state in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised wherever the subject exists. If it exists within the states, if a foreign voyage may commence or terminate at a port within a state, then the power of Congress may be exercised within a state.

How foreign commerce penetrates the interior of states.

This principle is, if possible, still more clear, when applied to commerce "among the several states." They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other states lie between them. What is commerce "among" them; and how is it to be conducted? Can a trading expedition between two adjoining states commence and terminate outside of each? And if the trading intercourse be between two states remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the states must, of necessity, be commerce with the states. In the regulation of trade with the Indian tribes, the action of the law, especially when the constitution was made, was chiefly within a state. The power of Congress then, whatever it may be, must be exercised within the territorial jurisdiction of the several states. The sense of the nation, on this subject, is unequivocally manifested by the provisions made in the laws for transporting goods, by land, between Baltimore and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore.

How interstate commerce conducted

We are now arrived at the inquiry, What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed

The power to regulate.

in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

145. *State Interference with Interstate Commerce*

The Constitution does not expressly give to Congress the exclusive power to regulate interstate commerce, and even if it did, the difficulty would still remain of drawing the line between acts affecting commerce wholly within a state and acts affecting commerce with other states. The Supreme Court has attempted to do this by laying down the general rule that subjects which admit of one uniform system or plan of regulation are national in character falling within the scope of the exclusive power of Congress, while limited or local matters not national in character may be regulated by the state, in case Congress has not acted with regard to them. Notwithstanding this general rule, the Courts must consider on its merits each case in which it is claimed that an action of a state constitutes an interference with interstate commerce. The method of dealing with such matters is illustrated by the following opinion declaring void a Pennsylvania law laying a tax on all freight carried in the state even though destined to points without the commonwealth.

he
iestion
ated.

The case presents the question whether the statute in question, — so far as it imposes a tax on freight taken up within the State

and carried out of it, or taken up outside the State and delivered within it, or, in different words, upon all freight other than that taken up and delivered within the State — is not repugnant to the provision of the Constitution of the United States which ordains "that Congress shall have power to regulate commerce with foreign nations and among the several States," or in conflict with the provision that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

Taxati and co merce.

The question is a grave one. It calls upon us to trace the line, always difficult to be traced, between the limits of State sovereignty in imposing taxation, and the power and duty of the Federal government to protect and regulate interstate commerce. While, upon the one hand, it is of the utmost importance that the States should possess the power to raise revenue for all the purposes of a state government, by any means, and in any manner not inconsistent with the powers which the people of the States have conferred upon the General Government, it is equally important that the domain of the latter should be preserved free from invasion, and that no State legislation should be sustained which defeats the avowed purposes of the Federal Constitution, or which assumes to regulate, or control subjects committed by that Constitution exclusively to the regulation of Congress.

The n of the in que

Before proceeding, however, to a consideration of the direct question whether the statute is in direct conflict with any provision of the Constitution of the United States, it is necessary to have a clear apprehension of the subject and the nature of the tax imposed by it. It has repeatedly been held that the constitutionality, or unconstitutionality of a State tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid. . . .

This t laid o freigh carrie

Upon what, then, is the tax imposed by the act of August 25th, 1864, to be considered as laid? Where does the substantial burden rest? Very plainly it was not intended to be, nor is it in fact, a tax upon the franchise of the carrying companies, or upon

their property, or upon their business measured by the number of tons of freight carried. On the contrary, it is expressly laid upon the freight carried. The companies are required to pay to the State treasurer for the use of the Commonwealth, "on each two thousand pounds of freight so carried," a tax at the specified rates. And this tax is not proportioned to the business done in transportation. It is the same whether the freight be moved one mile or three hundred. If freight be put upon a road and carried at all, tax is to be paid upon it, the amount of the tax being determined by the character of the freight. . . .

es it
ect
erstate
mmerce?

Considering it, then, as manifest that the tax demanded by the act is imposed, not upon the company, but upon the freight carried, we proceed to inquire whether, so far as it affects commodities transported through the State, or from points without the State to points within it, or from points within the State to points without it, the act is a regulation of interstate commerce. Beyond all question the transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. This has never been doubted, and probably the transportation of articles from one State to another was the prominent idea in the minds of the framers of the Constitution, when to Congress was committed the power to regulate commerce among the several States. A power to prevent embarrassing restrictions by any State was the thing desired. The power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations. It would be absurd to suppose that the transmission of the subjects of trade from the State to the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade either with foreign nations or among the States. . . .

ıy impo-
ion is a
straint
. trade.

The same power that may impose a tax of two cents per ton upon coal carried out of the State, may impose one of five dollars. Such an imposition, whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one State to another without being obstructed by the intervention of State

lines. It would hardly be maintained, we think, that had the State established custom-houses on her borders, wherever a railroad or canal comes to the State line, and demanded at these houses a duty for allowing merchandise to enter or leave the State upon one of those railroads or canals, such an imposition would not have been a regulation of commerce with her sister States. Yet it is difficult to see any substantial difference between the supposed case and the one we have in hand. The goods of no citizen of New York, New Jersey, Ohio, or of any other State, may be placed upon a canal, railroad, or steamboat within the State for transportation any distance, either into or out of the State, without being subjected to the burden. Nor can it make any difference that the legislative purpose was to raise money for the support of the State government, and not to regulate transportation. It is not the purpose of the law, but its effect, which we are now considering. . . .

A tax on passengers is void.

Interstate transportation of passengers is beyond the reach of a State legislature. And if State taxation of persons passing from one State to another, or a State tax upon interstate transportation of passengers is unconstitutional, *a fortiori*, if possible, is a State tax upon the carriage of merchandise from State to State, in conflict with the Federal Constitution. Merchandise is the subject of commerce. Transportation is essential to commerce; and every burden laid upon it is *pro tanto* a restriction. Whatever, therefore, may be the true doctrine respecting the exclusiveness of the power vested in Congress to regulate commerce among the States, we regard it as established that no State can impose a tax upon freight transported from State to State, or upon the transporter because of such transportation.

Conclusion

But while holding this, we recognize fully the power of each State to tax at its discretion its own internal commerce, and the franchises, property, or business of its own corporations, so that interstate intercourse, trade, or commerce, be not embarrassed or restricted. That must remain free. The conclusion of the whole is that, in our opinion, the act of the legislature of Pennsylvania

of August 25th, 1864, so far as it applies to articles carried through the State, or articles taken up in the State and carried out of it, or articles taken up without the State and brought into it, is unconstitutional and void.

146. *The Condition of Transportation in 1885*

Although the federal and state governments lavished aid upon railway corporations in the form of land grants, subsidies, and franchises, it was a long time before any serious attempt was made to protect the public from discriminations and exorbitant charges by common carriers. At last in 1885 an important Senate committee was appointed to investigate conditions of transportation throughout the United States and make recommendations for federal legislation. Largely on the basis of the report of this committee the Interstate Commerce Act was passed in 1887. The specific abuses against which the legislation was directed are thus stated by the Senate committee: —

ie appointment of e committee.

The committee was appointed by the President of the Senate March 21, 1885, under authority of a resolution adopted by the Senate of the United States March 17, 1885, and reading as follows:

Resolved, That a select committee of five Senators be appointed to investigate and report upon the subject of the regulation of the transportation by railroad and water routes in connection or in competition with said railroads of freight and passengers between the several States, with authority to sit during the recess of Congress, and with power to summon witnesses and to do whatever is necessary for a full examination of the subject, and report to the Senate on or before the second Monday of December next. Said committee shall have power to appoint a clerk and stenographer, and the expenses of such investigation shall be paid from the appropriation for expenses of inquiries and investigations ordered by the Senate.

he complitions of e question.

The committee began its work impressed with the importance of the duty with which it had been charged, and with each step taken in prosecuting the inquiry directed has realised more fully

how serious were the obstacles to be overcome in attempting to faithfully carry out its instructions. The field opened up for investigation was so extensive, the social, economic, legal, and other questions involved so complicated, and the agricultural, commercial, industrial, and corporate interests affected so vast and varied as to require for a thorough and satisfactory examination into technical details more time and labor than could be given, with the facilities at command, during the summer recess of the Senate. . . .

Purpose of the investigation.

The conclusion was reached that the committee would best serve the public interest and carry out the purpose of the resolution under which it was appointed by devoting its attention mainly to the consideration of the question whether any legislation to regulate the management of the transportation lines of the country is advisable, and, if so, what the scope and character of that legislation should be. This is the question that awaits the decision of the Congress. . . .

The committee recognizes the justice of this demand, and believes that action by Congress looking to the regulation of interstate transportation is necessary and expedient, for the following reasons:

The carrier master of the situation.

1. The public interest demands regulation of the business of transportation because, in the absence of such regulation, the carrier is practically and actually the sole and final arbiter upon all disputed questions that arise between shipper and carrier as to whether rates are reasonable or unjust discrimination has been practiced. . . .

2. It is the duty of Congress to undertake the regulation of the business of transportation, because of admitted abuses in its management and of acknowledged discriminations between persons and places in its practical operation — evils which it is possible to reach and remedy only through the exercise of the powers granted by the Constitution to Congress, and against which the citizen is entitled to the protection and relief the national authority can alone afford. . . .

4. National legislation is also necessary, because the business of

Transportation is national.

transportation is essentially of a nature which requires that uniform system and method of regulation which the national authority can alone prescribe. . . .

5. The failure of Congress to act is an excuse for the attempts made by the railroads to regulate the commerce of the country in their own way and in their own interests by whatever combinations and methods they are able to put into operation. . . .

The complaints against the railways.

The complaints against the railroad system of the United States expressed to the committee are based upon the following charges:

1. That local rates are unreasonably high, compared with through rates.

High rates.

2. That both local and through rates are unreasonably high at non-competing points, either from the absence of competition or in consequence of pooling agreements that restrict its operation.

3. That rates are established without apparent regard to the actual cost of the service performed, and are based largely on "what the traffic will bear."

Discriminations.

4. That unjustifiable discriminations are constantly made between individuals in the rates charged for like service under similar circumstances.

5. That improper discriminations are made between articles of freight and branches of business of a like character, and between different quantities of the same class of freight.

6. That unreasonable discriminations are made between localities similarly situated.

Rebates.

7. That the effect of the prevailing policy of railroad management is, by an elaborate system of secret special rates, rebates, drawbacks, and concessions, to foster monopoly, to enrich favorite shippers, and to prevent free competition in many lines of trade in which the item of transportation is an important factor.

8. That such favoritism and secrecy introduce an element of uncertainty into legitimate business that greatly retards the development of our industries and commerce.

9. That the secret cutting of rates and the sudden fluctuations that constantly take place are demoralizing to all business except

that of a purely speculative character, and frequently occasion great injustice and heavy losses.

10. That, in the absence of national and uniform legislation, the railroads are able by various devices to avoid their responsibility as carriers, especially on shipments over more than one road or from one State to another, and that shippers find great difficulty in recovering damages for the loss of property or injury thereto. Avoidance of responsibility.

11. That railroads refuse to be bound by their own contracts, and arbitrarily collect large sums in the shape of overcharges in addition to the rates agreed upon at the time of shipment.

12. That railroads often refuse to recognize or be responsible for the acts of dishonest agents acting under their authority.

13. That the common law fails to afford a remedy for such grievances, and that in cases of dispute the shipper is compelled to submit to the decision of the railroad manager or pool commissioner, or run the risk of incurring further losses by greater discriminations.

14. That the differences in the classifications in use in various parts of the country, and sometimes for shipments over the same roads in different directions, are a fruitful source of misunderstandings, and are often made a means of extortion.

15. That a privileged class is created by the granting of passes, and that the cost of the passenger service is largely increased by the extent of this abuse. Free pass

16. That the capitalization and bonded indebtedness of the roads largely exceed the actual cost of their construction or their present value, and that unreasonable rates are charged in the effort to pay dividends on watered stock and interest on bonds improperly issued. Over-capitalization.

17. That railroad corporations have improperly engaged in lines of business entirely distinct from that of transportation, and that undue advantages have been afforded to business enterprises in which railroad officials were interested.

18. That the management of the railroad business is extravagant and wasteful, and that a needless tax is imposed upon the

shipping and traveling public by the unnecessary expenditure of large sums in the maintenance of a costly force of agents engaged in a reckless strife for competitive business.

147. *The Interstate Commerce Commission at Work*

The Interstate Commerce Act of 1887, as amended by later statutes, provides for a commission of seven members, appointed by the President and Senate, and empowered, on complaint and after hearing, to determine and prescribe reasonable rates, regulations, and practices, to order reparation to injured shippers, and to require any carriers to desist from unjust discrimination or undue or unreasonable preferences. The way in which the commission may grant relief to shippers is well illustrated by the report of the action in the following case: —

W. O. Mitchell *v.* Atchison, Topeka & Santa Fe Railway Company; Chicago, Rock Island & Pacific Railway Company; St. Louis & San Francisco Railroad Company; and Missouri, Kansas & Texas Railway Company. Submitted June 4, 1907. Decided July 8, 1907. Report and Order of the Commission.

PROUTY, COMMISSIONER:

he nature the mplaint.

The complainant is a resident of Oklahoma City and a shipper of wheat, who complains that the rates charged by the defendants for the transportation of that commodity from Oklahoma City to Gainesville, Tex., and Forth Worth, Tex., are excessive. The Atchison, Topeka and Santa Fe Ry. Co. and its connection, the Gulf, Colorado & Santa Fe Ry. Co., carry this traffic from Oklahoma City to Gainesville, while all the defendants reach Fort Worth. The short-line distances are 140 miles to Gainesville and 202 miles to Fort Worth, and the rate in both cases was at the date of the hearing 28½ cents per 100 pounds. . . .

The rate on wheat for 200 miles is 15 cents in Texas, 13 cents in Kansas, 18 cents in Nebraska, 10.8 cents in Iowa, 17.5 cents in Minnesota. In our opinion, under all the circumstances, the rate from Oklahoma City to Fort Worth ought not to exceed 22 cents per 100 pounds, and to Gainesville 20 cents per 100 pounds.

These rates are extremely high and the difference between Fort Worth and Gainesville rather small considering the distance by which they are separated; but, as already said, consideration must be given to the fact that it is impossible to pass abruptly from the group system.

It should be further observed that these rates are intended to apply only to local consumption at Fort Worth and Gainesville. No milling-in-transit or other transit privilege should be allowed. If the grain is shipped beyond these points, either as wheat or flour, it should be upon the local rates out.

An order in accordance with the above views will be issued.

Order

Upon the foregoing report —

The compan ordered desist.

It is ordered, That the defendants, Atchison, Topeka & Santa Fe Railway Company; Chicago, Rock Island & Pacific Railway Company; St. Louis & San Francisco Railroad Company, and Missouri, Kansas and Texas Railway Company, be, and they are hereby, notified and required to cease and desist, on or before the 1st day of September, 1907, from charging, demanding, collecting or receiving for the transportation of wheat in carloads from Oklahoma City, in the Territory of Oklahoma, to Gainesville in the State of Texas, their present rate of 28½ cents per 100 pounds.

The ne rate fix

It is further ordered, That said defendants be, and they are hereby, notified and required to establish and put in force on or before said 1st day of September, a rate of not more than 20 cents per 100 pounds and apply that rate to the transportation of wheat in carloads over their respective lines of railway from said Oklahoma City to said Gainesville, during a period of at least two years from and after said 1st day of September.

It is further ordered, That said defendants be and they are hereby, notified and required to cease and desist, on or before the 1st day of September, 1907, from charging, demanding, collecting or receiving, for the transportation of wheat, in carloads, from said

Oklahoma City to Fort Worth, in the State of Texas, their present rate of 28½ cents per 100 pounds.

It is further ordered, That said defendants be and they are hereby notified and required to establish and put in force, on or before said 1st day of September, a rate of not more than 22 cents per 100 pounds and apply that rate to the transportation of wheat, in carloads, over their respective lines of railway, from said Oklahoma City to said Fort Worth, during a period of at least two years from and after the said 1st day of September.

Rates to be made public.

And it is further ordered, That said defendants be and they are hereby, authorized to make said 20-cent rate and said 22-cent rate effective upon three days' notice to the public and the Interstate Commerce Commission, given in the manner required by law. The tariff containing such rates should bear the notation that it is issued under the authority hereby granted.

148. *The Anti-Trust Act of 1890*

Under its general power to regulate interstate commerce, Congress has passed many laws, such as the Safety Appliance Act, the Arbitration Act, the Pure Food Law, and the Employers' Liability Law, but the most famous of them all is the Anti-trust Law of 1890, the important clauses of which are given here: —

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to

monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 4. The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act. . . .

Sec. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law.

Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the

amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

Sec. 8. That the word "person," or "persons," whenever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Approved, July 2, 1890.

CHAPTER XX

NATIONAL RESOURCES

149. *The Governors' Conference, 1908*

DURING the past century, the federal government granted away to private persons millions of acres of forest, mineral, and arable lands for the purpose of securing the settlement of the great West and stimulating the development of industries and transportation facilities. The unexpected rapidity, however, with which our industries have drawn upon our natural resources has brought us within recent years to a keen realization of the fact that this lavish recklessness cannot go on indefinitely. Wide publicity was given to the problem of conserving our resources by the action of President Roosevelt in calling a conference of the governors of all the states to take the question into serious consideration. The conference met at Washington in May, 1908, and after a few days' deliberation issued the following declaration of principles: —

Material resources the foundation of our prosperity.

We, the Governors of the States and Territories of the United States of America, in conference assembled, do hereby declare the conviction that the great prosperity of the country rests upon the abundant resources of the land chosen by our forefathers for their homes and where they laid the foundation of this great nation.

We look upon these resources as a heritage to be made use of in establishing and promoting the comfort, prosperity and happiness of the American people, but not to be wasted, deteriorated or needlessly destroyed.

We agree that our country's future is involved in this: that the great natural resources supply the material basis upon which our civilization must continue to depend and upon which the perpetuity of the nation itself rests.

We agree, in the light of facts brought to our knowledge and

sources
eatened
th ex-
ustion.

from information received from sources which we cannot doubt, that this material basis is threatened with exhaustion. Even as each succeeding generation from the birth of the nation has performed its part in promoting the progress and development of the republic, so do we in this generation recognize it as a high duty to perform our part, and this duty in large degree lies in the adoption of measures for the conservation of the natural wealth of the country.

hat are
r
ources?

We declare our firm conviction that this conservation of our natural resources is a subject of transcendent importance which should engage unremittingly the attention of the nation, the States and the people in earnest co-operation. These natural resources include the land on which we live and which yields our food; the waters, which fertilize the soil, supply power and form great avenues of commerce; the forests, which yield the materials for our homes, prevent erosion of the soil and conserve the navigation and other uses of our streams, and the minerals, which form the basis of our industrial life and supply us with heat, light and power.

hat
ould be
ne.

We agree that the land should be so used that erosion and soil wash should cease, that there should be reclamation of arid and semi-arid regions by means of irrigation and of swamp and overflowed regions by means of drainage; that the waters should be so conserved and used as to promote navigation, to enable the arid regions to be reclaimed by irrigation, and to develop power in the interests of the people; that the forests, which regulate our rivers, support our industries and promote the fertility and productiveness of the soil, should be preserved and perpetuated; that the minerals found so abundantly beneath the surface, should be so used as to prolong their utility, that the beauty, healthfulness and habitability of our country should be preserved and increased; that the sources of national wealth exist for the benefit of all the people and that the monopoly thereof should not be tolerated.

We commend the wise forethought of the President in sounding the note of warning as to the waste and exhaustion of the natural

resources of the country and signify our high appreciation of his action in calling this Conference to consider the same and to seek remedies therefor through co-operation of the Nation and the States. We agree that this co-operation should find expression in suitable action by the Congress within the limits of and coextensive with the national jurisdiction of the subject and, complementary thereto, by the Legislatures of the several States within the limits of and coextensive with their jurisdiction.

Fede state ment coöp

We declare the conviction that in the use of the natural resources our independent States are interdependent and bound together by ties of mutual benefits, responsibilities and duties.

We agree in the wisdom of future conferences between the President, members of Congress and the Governors of the States on the conservation of our natural resources with a view to continued co-operation and action on the lines suggested. And to this end we advise that from time to time, as in his judgment may seem wise, the President call the Governors of the States, members of Congress and others into conference.

Futu confe

We agree that further action is advisable to ascertain the present condition of our natural resources and to promote the conservation of the same. And to that end we recommend the appointment by each State of a commission on the conservation of natural resources to co-operate with each other and with any similar commission on behalf of the Federal Government.

A su our resou

We urge the continuation and extension of forest policies adapted to secure the husbanding and renewal of our diminishing timber supply, prevention of soil erosion, the protection of headwaters and the maintenance of the purity and navigability of our streams. We recognize that the private ownership of forest lands entails responsibilities in the interests of all the people, and we favor the enactment of laws looking to the protection and replacement of privately owned forests.

Fore serva

We recognize in our waters a most valuable asset of the people of the United States and we recommend the enactment of laws looking to the conservation of water resources for irrigation, water

Irrig

supply, power and navigation, to the end that navigable and source streams may be brought under complete control and fully utilized for every purpose. We especially urge on the Federal Congress the immediate adoption of a wise, active and thorough waterway policy, providing for the prompt improvement of our streams and conservation of their watersheds required for the uses of commerce and the protection of the interests of our people.

We recommend the enactment of laws looking to the prevention of waste in the mining and extraction of coal, oil, gas and other minerals, with a view to their wise conservation for the use of the people and to the protection of human life in the mines.

Let us conserve the foundations of our prosperity.

150. *Why Forest Reservations Should Be Made*

In 1906, the Senate committee in charge of the bill providing for the purchase of vast areas in the Appalachian and White mountains for forest reservations made this argument in support of the policy they were advocating: —

Consumption of timber.

First. The creation of these reserves is a wise public policy. Between the census of the years 1850 and 1900, the population of the country increased from 23,000,000 to 76,000,000, or 330 per cent., but the money value of the lumber product which it consumed increased from $60,000,000 to $566,000,000 or 940 per cent. Both the per capita consumption of timber and the price of timber are increasing. It is estimated that 24 per cent. of the Southern Appalachian region has been deforested. Deforestation means loss of power to produce future forests. It is in the public interest that these lands should be acquired and held by the Government as permanent sources of timber supply.

The forests will pay.

Second. The acquisition of these lands by the Government will be good business policy. The use of the western reserves is just beginning, but the Government receipts from these reserves are approximating one-half the outgo. Within a short term of years, they will undoubtedly carry themselves. At the same time their

property value is rising and will continue to rise, both from the increasing value of the timber and from the greater productiveness of the forests under management. With a present value of not less than $250,000,000, these western reserves are being administered at an annual cost of one third of one per cent of this sum while they are increasing in value fully 10 per cent a year. This is in addition to their enormous indirect returns to the public welfare from their indispensable relation to successful irrigation, to mining and other industries which demand lumber, to settlers, and to stock grazing.

Effect of deforestation on navigation.

Third. The creation of these reserves is, now or later, a necessary policy. Sooner or later the certain consequences of forest destruction which is now taking place will force the national government to step in. The question is not merely that of preventing the impoverishment of the immediate localities and the conversion of productive land into a waste of barren rock. The loss of the forest is followed by the loss of the soil and by recurring floods. The headwaters of every important river south of the Ohio and the Potomac and east of the Mississippi including the tributaries of these streams, rise in the southern Appalachians, while the White Mountains feed important rivers of every New England state except Rhode Island. The rainfall of both regions is heavy and distributed throughout the year.

Floods and sandbars.

After denudation, every rain turns the shrunken streams into mountain torrents which devastate property and bear down vast quantities of silt to obstruct navigable rivers. The sand bars thus formed accentuate the effect of alternating high and low water periods, and large government expenditures for dredging and harbor improvements are entailed. The clearing of river channels and harbors in North Carolina, South Carolina, Georgia and Alabama is now being urged. Yet deforestation is only in its first stage. Eventually in this country, as has been the case in France, the stripped mountains will become so inimical to the public good that the Government will have to take charge of them and reforest them. But the expense of this, when once the forests are gone,

will be only less ruinous than the damage which it will check, and the remedy will require many years to become operative.

The problem not a local one.

The question of establishing these reserves is not a local or a state question, but a national question. The interests affected are interstate. The evils which the reserves will check fall most heavily on distant communities, and even upon the National Government. Here again, if we are wise, we shall draw a lesson from French experience. In France, the first efforts to repair the disastrous effects of torrents were made by engineers along the low water courses. Dredging and dams, however, proved at best but temporarily effective. Only when they began to push their work up to the headwaters of the streams did they find themselves on the right road. The Government now puts into the building of levees and the improvement of navigation in rivers and harbors many millions of dollars annually. The reserves constitute a far more economical expenditure for the same purpose in addition to their large contributions to public welfare.

The problem is national in character.

It is not right to expect the state within which these areas lie to reserve them for the benefit of other states. It is impossible for states which suffer from conditions outside their own territory to remedy them by their own action. There has been set aside in the West, for essentially the same purposes which these reserves will secure, a vast area of reserves created from the national domain and benefiting primarily the people of the West. But the interests involved both in the West and in the East are too broad to be regarded as even sectional merely. The benefits of the proposed reserves will be national benefits and their expenses should be borne by the nation.

151. *The National Forest Reserves*

Mr. Gifford Pinchot, whose eminent services as chief of the Forest Service have won for him national recognition, briefly describes in this interesting article published in *The Independent* the extent and character of the national forest domain.

The United States now holds in National Forests (formerly called forest reserves) about 165,000,000 acres of land. This is a vast area — greater than all of France, and more than double that of the British Isles. It is, however, but 7 per cent. of the total area of the United States. As a permanent source of wood supply it is altogether inadequate, by itself, even for our present needs. Though most of the forest upon it is still virgin, the timber now standing would hold out against a rate of consumption equal to that of 1906 (the last year for which the figures have as yet been compiled) for not more than four or five years. Yet at the average price which the Forest Service is now getting for timber from the National Forests this timber would bring, just as it stands in the woods, nearly enough to pay the national debt.

The exten of our forests.

European publicists have held that from one-fifth to one-third of a country should be in woodland. No such sweeping rule can, of course, be applied exactly; all the economic conditions must be taken into account. A country of high fertility and dense population, like Belgium or Holland, will do best to draw most of its wood supplies from abroad. The United States, however, must expect always to grow most of its timber supply at home. Indeed, as the world-shortage of timber, which is certainly approaching, becomes acute, we must expect the competition of foreign markets for the products of our own forests. It is commonly supposed that we shall be able to fall back on Canada, but Canada can give us nothing more than temporary relief. The Canadian forests hold far less merchantable timber than has been supposed; growing in the North they grow slowly; and their output will, as the country develops, be in increasing demand for home use, to say nothing of the needs of England and of the Pacific trade. Rightly used, the land in the United States, better suited to growing forests than to any other purpose, should fully supply our needs; but it is important to remember that more than three-quarters of this land is in private hands, and not in the National Forests.

How mucl should be woodland

Even within the National Forests not all of the land belongs to the Government; and of that which does, not all is timbered.

rivate aims in ational rests.

These forests were set aside from those parts of the public lands wholly or partly covered with timber or undergrowth, whether of commercial value or not, provided that they were not more valuable for mining or agriculture than for forest purposes. They cover, therefore, generally speaking, the more mountainous parts of the West, where there is rainfall enough to permit trees to grow, but where the land is too rough or too high for farming. Before they were set aside as forests they were open to entry under the public land laws of the United States, and most of them were sprinkled with land claims and patented lands. Many of them also were traversed by railroads which held land grants from the Government. Even after they became National Forests they remained subject to mineral entry, just like any other part of the public domain. Hence the National Forests are broken by interior holdings which, in a few places, amount to as much as one-third the total area. Just how much deduction should be made for these claims and perfected titles in all the National Forests is not yet known exactly, but it is probably as much as 15 per cent.

fuch brush ınd.

Again, the forests include a good deal of land which does not now grow trees. Some of it never will. This is the land which lies above timber line, and might just as well be left out of the forests if it were not invariably surrounded by National Forest lands, and if it had any value for any other purpose. There is also the land from which the forest has been burned away, but to which it will be restored again in time — a much larger amount than the naturally barren land. Further, in certain parts of New Mexico, Arizona, and southern California, much land has been put into national forests which is merely brushland, but on which the protection of even this inferior growth is absolutely essential to the water supply. . . .

152. *The Reservation of Mineral Lands*

In his effort to conserve public mineral lands, President Roosevelt, in a message of February 3, 1907, made the following recommendations to Congress: —

The national title to fuel resources.

I recommended [in a previous message] to Congress the enactment of such legislation as would provide for title to and development of the surface land as separate and distinct from the right to the underlying mineral fuels in regions where these may occur, and the disposal of these mineral fuels under a leasing system on conditions which would inure to the benefit of the public as a whole. I again call the attention of Congress to the importance of enacting such legislation. I care little for the details; the prime need is that the system should be established, that from henceforth the nation should retain its title to its fuel resources, and its right to supervise their development in the interest of the public as a whole.

Foreign experience with leasing

Such a leasing system as that proposed represents by no means an untried policy. In the Australian countries during the last fifteen years coal has been mined under a system of government leases, and on conditions so favorable for development that their coal and coke are to-day being sold on the Pacific Coast of both the American continents. In all the great coal producing European countries, except Great Britain, coal is being mined under government leases. In Great Britain, leases are granted almost entirely by the private land owners, but there as in other countries, the surface culture and the mining operations are conducted independently of each other. In Nova Scotia, British Columbia, India, and other British colonies a government leasing system has been adopted, and is working satisfactorily. . . .

Minerals as public utilities.

Mineral fuels, like the forests and navigable streams, should be treated as public utilities. This is generally recognized abroad. In some foreign countries, practical control of a large portion of the fuel resources was allowed years ago to pass into private hands; but the existing governments are endeavoring to regain this control in order that the diminishing fuel supply may be safeguarded for the common good, instead of being disposed of for the benefit of a few — though the mistake of the preceding generation in disposing of these fuels for a nominal return, cannot always be corrected by the present generation as the cost may be so enormous as to be prohibitory.

nd should e guarded ke forests nd water.

In our own Western States and Territories, the scarcity of both the water and forests has rendered necessary their preservation as public utilities; and the preservation of the forests for the purpose of conserving both the water and the timber supply has come to be recognized as the wise and proper policy of the Federal Government. The quantity of high grade mineral fuels in the West is relatively much smaller than that of the forests; and the proper conservation of these fuels is a matter of far-reaching importance. This government should not now repeat the mistakes of the past. Let us not do what the next generation cannot undo. We have a right to a proper use of both the forests and the fuel during our lifetime but we should not dispose of the birthright of our children. If this government sells its remaining fuel lands, they pass out of its future control.

If it now leases them we retain control and a future Congress will be at liberty to decide whether it will continue or change this policy. Meanwhile the government can inaugurate a system which will encourage the separate and independent development of the surface lands for agricultural purposes and the extraction of the mineral fuels in such manner as will best meet the needs of the people and best facilitate the development of manufacturing industries. . . .

eave omething or the ture to ecide.

Already probably one half of the total area of the high-grade coals in the West has passed under private control. Including both the lignite and the coal areas, these private holdings probably aggregate not less than 30,000,000 acres of coal fields. With the remainder of the lands containing mineral fuels reserved at least by the government, there will be ample opportunity to determine in the near future which of the two systems — private ownership or the leasing system with general government supervision — will best protect the interests of the people and thus promote the permanent development of the West.

'he xhaustion f our fuels.

The necessity for care in the future management of these fuel supplies is further illustrated by the rapid rate at which use of such fuels is increasing in the United States. The amount of coal used

in this country during the last ten years is practically equal to that used during the preceding fifty years of its history. During each decade of this period the coal used was practically equal to the sum of that used during all the preceding decades. This remarkable development and the certain continuity of this prodigious growth compels us to recast all estimates as to the life of our "inexhaustible resources." We can foresee the time when the eastern industries will be much more largely taxed for supplying foreign markets. Then the West will also be largely engaged in varying manufacturing enterprises and this will require the intelligent use of every ton of available fuel in that region. The grave importance of conserving the fuel supplies in the West still remaining under the control of the Government, with a view to the accomplishment of these important purposes, impels me again to bring this matter to the attention of Congress. . . .

153. *The Reclamation of Arid Lands*

Quite as important as the conservation of our national resources is the development of the great arid regions which are to-day unproductive. The most distinguished advocate of a generous policy of governmental reclamation has been Mr. Newlands, of Nevada, and in championing the Reclamation Law of 1902, he made the following speech in the House of Representatives on May 14, of that year.

The so-called arid region extends from about the one hundredth meridian of longitude to the Pacific coast. Draw a line north and south through the middle of the two Dakotas, Nebraska, Kansas, and Oklahoma, and all to the west of it is either arid or semi-arid, the aridity increasing as the Rocky Mountains are approached. The eastern portion of this great region is semi-arid, while the narrow fringe along the Pacific seaboard is humid. Within the boundaries named thirteen States and three Territories lie wholly or in part, and, excluding Alaska, they constitute nearly one-half of the superficial area of the Republic. It is estimated that they contain about 600,000,000 acres of vacant public land,

of which about 60,000,000 acres may be irrigated if the water supply is properly conserved and distributed. In other words, it is possible in the future to actually reclaim for cultivation in this vast region an area about equal to the area of the two States of Illinois and Iowa. The rest of this vast area cannot be cultivated. It will consist largely of mountain ranges and arid plains, for which it will be impossible to obtain sufficient water for irrigation, though they will be useful for grazing.

ıe
aracter
the
ter
pply.

This region was once called "The Great American Desert." It is mainly mountainous. The Rocky Mountains, the Sierra Nevada, and the other mountain ranges take up a very large proportion of its area. It is impossible anywhere to cultivate by means of rainfall. Grasses adapted to the arid region grow on these plains and mountains and sustain the wandering herds from which most of the beef cattle of the country are recruited. Only valleys and plateaus in their vicinity are level enough for cultivation. The mountainous character of the country would prevent cultivation even were water abundant; but there is only sufficient water for a small part of the level portion of this area. The waters for cultivation must come from the creeks, streams, and rivers which have their sources in the snows of the mountains. These waters must be led away from the streams by lateral canals and ditches, and in order to accomplish this the water must be taken out where damming the river is comparatively easy. The snows which are the source of these creeks, streams, and rivers fall in the winter and melt in the spring and early summer. Most of these snows melt before May, leaving a scanty supply for June, July, and August, the period when the heat is intense, and when the dry air sucks the moisture out of everything, and when moisture is most required for ripening crops.

naall
igation
hemes.

The first lands taken up in such a region are along the creeks and rivers and in the valleys where water is needed for supply. These lands being overflowed by the spring freshets, would produce wild grasses, which the stockmen would cut for hay, thus tiding over severe winters when the snow covered and concealed

the wild grasses of the plains and imperilled the lives of the stock. Then, growing more provident, the stockmen would divert the flood waters by canals over the land not naturally overflowed, and thus increase the hayfields. Then came the mines with their communities of merchants and miners requiring food supplies of every kind. And so the small farmer was developed, who, by diverting canals and ditches, sought to give his land the needed water for cereals, vegetables and fruits.

The necessity for large scientific treatmen

From these conditions has come the present irrigation development of the West. The condition of the streams in the period of lowest water was the measure of possible reclamation. The flood waters were of no use, for they were not available when needed for ripening the crops, and it is these flood waters, which finally make their way to the ocean or to great lakes in the sink of the desert, like Salt Lake, Humboldt Lake, Walker Lake, and others, that it is proposed to make available for the arid lands now remaining unsettled. To accomplish this requires the broadest generalization, the study of an entire river, with all its tributaries and their subtributaries; the maintenance of an equal and sustained flow of the river during the planting and growing season, and the utilization of every device upon every part of the river necessary to preserve this equal flow. The lands to be benefited may be hundreds of miles away from the location of the stored waters, but these stored waters being above them, not below them, will be on tap, responsive to the demands of intelligent husbandry. . . .

The prob of even tribution water.

The idea is that the Government should do the primary work of constructing the reservoirs and larger canals, so that the water may be brought within the reach of those who are to settle on the public lands and use it in their reclamation and cultivation. Storage enables the utilization of a greater amount of the torrential waters in irrigating the arid plains, as the stored waters supplement the torrential waters later on and ripen the crops which would otherwise be burnt by the hot sun. Storage involves the treatment of an entire watershed in a scientific way regardless of State lines. The problem is to maintain an equal and sustained flow of the

streams, so that the torrential waters may be kept from flowing to waste and may be conserved and let into the stream when the natural supply is exceedingly limited. Very large rivers have numerous tributaries, with their sources in the snows of the mountains. The more water there is stored the greater the extent of the torrential waters that can be utilized in irrigation, for storage guarantees the service of water when it is most needed, and settlers can safely take out the torrential waters in the spring and bring larger areas of land under cultivation when they feel assured that the stored waters will come on later in a period of drought, and furnish the crops with the needed moisture.

CHAPTER XXI

THE GOVERNMENT OF TERRITORIES

THE federal Constitution contains no clause expressly authorizing the acquisition of territory and is very meager in its provisions controlling the government of territories. Section 3 of Article IV runs as follows: —

> New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor shall any State be formed by the junction of two or more States or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.
>
> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State.

154. *Constitutional Limitations on Congress in Governing Territories* *

In discussing the powers of Congress in the government of territories, Mr. Justice Day made the following observations: —

The Constituti and territories

It may be regarded as settled that the Constitution of the United States is the only source of power authorizing action by any branch of the federal government. "The government of the United States was born of the Constitution, and all powers which it enjoys or may exercise must be either derived expressly or by implication from that instrument." It is equally well settled that the United States may acquire territory in the exercise of the treaty-making power by direct cession as the result of war and in making effectual the terms of peace; and for that purpose has the powers of other

sovereign nations. This principle has been recognized by this Court from its earliest decisions. The Convention which framed the Constitution of the United States, in view of the territory already possessed and the possibility of acquiring more, inserted in that instrument, in Article IV, section 3, a grant of express power to Congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

ongress ot without nitations.

While these cases and others which are cited in the late case of Downes *v.* Bidwell sustain the right of Congress to make laws for the government of territories without being subject to all the restrictions which are imposed on that body when passing laws for the United States, considered as a political body of states in union, the exercise of the power expressly granted to govern the territories is not without limitations. Speaking of this power Mr. Justice Curtis said: "If then this clause does contain a power to legislate respecting the territory, what are the limits of that power? To this, I answer that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that in the exercise of legislative power, Congress cannot pass an ex post facto law or bill of attainder and so in respect to each of the other prohibitions contained in the Constitution."

'he pplication f the rohibitions epends on ie character f the rritory.

In every case where Congress undertakes to legislate in the exercise of the power conferred by the Constitution, the question may arise as to how far the exercise is limited by the "prohibitions" of that instrument. The limitations which are to be applied in any given case involving territorial government must depend upon the relation of the particular territory to the United States, concerning which Congress is exercising the power conferred by the Constitution. That the United States may have territory which is not incorporated into the United States as a body politic, we think was recognized by the framers of the Constitution in enacting the article already considered giving power over the territories and is sanctioned by the opinions of the justices

concurring in the judgment in Downes *v.* Bidwell. Until Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled by that decision that the territory is to be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation. For this case the practical question is, must Congress in establishing a system for trial of crimes and offenses committed in the Philippine Islands carry to their people by proper affirmative legislation a system of trial by jury?

Jury trial not a fundamental right.

It was said in the Mankichi case that when the territory had not been incorporated into the United States these requirements [relating to indictment by grand jury and trial by jury] were not limitations upon the power of Congress in providing a government for territory in execution of the powers conferred upon Congress. In the same case Mr. Justice Brown in the course of his opinion said: "We would say that most if not all the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case (right to trial by jury and presentment by grand jury) are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property and their well-being."

Conclusion.

We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in Article IV, section 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not without legislation and of its own force, carry such right to territory so situated.

155. *Our Relations with Cuba*

In a joint resolution, approved April 28, 1898, Congress set forth these grounds for the intervention in Cuba which led to the war with Spain and the acquisition of a protecting power over that island: —

Reasons for the action.

Whereas the abhorrent conditions which have existed for more than three years in the Island of Cuba, so near our own borders, have shocked the moral sense of the people of the United States, have been a disgrace to Christian civilization, culminating, as they have, in the destruction of a United States battleship, with two hundred and sixty-six of its officers and crew, while on a friendly visit in the harbor of Havana, and can not longer be endured, as has been set forth by the President of the United States in his message to Congress of April eleventh, eighteen hundred and ninety-eight, upon which the action of Congress was invited: Therefore,

Resolutions.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, First. That the people of the Island of Cuba are, and of right ought to be, free and independent.

Second. That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government in the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters.

Third. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect.

Fourth. That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said Island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the Island to its people.

The following provisions of law govern the relations of Cuba with the United States. They were incorporated, as the "Platt amendment," to the army appropriation act of March, 1901, and accepted by the Cubans as an appendix to their constitution: —

Foreign relations.

That the government of Cuba shall never enter into any treaty or other compact with any foreign power or powers which will impair or tend to impair the independence of Cuba, nor in any manner authorize or permit any foreign power or powers to obtain by colonization or for military or naval purposes or otherwise, lodgment in or control over any portion of said island.

Debts.

That said government shall not assume or contract any public debt, to pay the interest upon which, and to make reasonable sinking fund provision for the ultimate discharge of which, the ordinary revenues of the island, after defraying the current expenses of government shall be inadequate.

Intervention.

That the government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the treaty of Paris on the United States, now to be assumed and undertaken by the government of Cuba.

That all Acts of the United States in Cuba during its military occupancy thereof, are ratified and validated, and lawful rights acquired thereunder shall be maintained and protected.

Improvement of conditions in Cuba.

That the government of Cuba will execute, and as far as necessary extend, the plans already devised or other plans to be mutually agreed upon for the sanitation of the cities of the island, to the end that a recurrence of epidemic and infectious diseases may be prevented, thereby assuring protection to the people and commerce of Cuba, as well as to the commerce of the southern ports of the United States and the people residing therein.

That the Isle of Pines shall be omitted from the proposed constitutional boundaries of Cuba, the title thereto being left to future adjustment by treaty.

Coaling station.

That to enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense, the government of Cuba will sell or lease to the United States lands necessary for coaling or naval stations, at certain specified points, to be agreed upon with the President of the United States.

That by way of further assurance the government of Cuba will embody the foregoing provisions in a permanent treaty with the United States.

156. *Principles of American Policy in the Philippines*

In 1900, President McKinley appointed the second Philippine Commission and on April 7 of that year he transmitted to them through the Secretary of War a letter containing their instructions from which these extracts are taken: —

The inauguration of government in the islands.

In the message transmitted to Congress on the 5th of December, 1899, I said, speaking of the Philippine Islands: "As long as the insurrection continues the military arm must necessarily be supreme. But there is no reason why steps should not be taken from time to time to inaugurate governments essentially popular in their form as fast as territory is held and controlled by our troops. To this end I am considering the advisability of the return of the commission or of such members thereof as can be secured, to aid the existing authorities and facilitate this work throughout the island."

The commission.

To give effect to the intention thus expressed, I have appointed Hon. William H. Taft, of Ohio; Prof. Dean C. Worcester, of Michigan; Hon. Luke I. Wright, of Tennessee; Hon. Henry C. Ide, of Vermont, and Prof. Bernard Moses, of California, Commissioners to the Philippine Islands to continue and perfect the work of organizing and establishing civil government already commenced by the military authorities, subject in all respects to any laws which Congress may hereafter enact.

The Commissioners named will meet and act as a board, and the Hon. William H. Taft is designated as President of the board.

It is probable that the transfer of authority from military commanders to civil officers will be gradual and will occupy a considerable period. Its successful accomplishment and the maintenance of peace and order in the meantime will require the most perfect coöperation between the civil and military authorities of the island, and both should be directed during the transition period by the same executive Department. The commission will therefore report to the Secretary of War, and all their action will be subject to your approval and control.

The commission under the Secretary of War.

You will instruct the commission to proceed to the city of Manila, where they will make their principal office and to communicate with the military governor of the Philippine Islands, whom you will at the same time direct to render to them every assistance within his power in the performance of their duties. Without hampering them by too specific instructions, they should in general be enjoined, after making themselves familiar with the conditions and needs of the country, to devote their attention in the first instance to the establishment of municipal governments, in which the natives of the islands, both in the cities and in the rural communities, shall be afforded the opportunity to manage their own local affairs to the fullest extent of which they are capable and subject to the least degree of supervision and control which a careful study of their capacities and observation of the workings of native control show to be consistent with the maintenance of law, order, and loyalty.

Municipal governments

The next subject in order of importance should be the organization of government in the larger administrative divisions corresponding to countries, departments, or provinces, in which the common interests of many or several municipalities falling within the same tribal lines, or the same natural geographical limits, may best be subserved by a common administration. Whenever the commission is of the opinion that the condition of affairs in the islands is such that the central administration may safely be transferred from military to civil control, they will report that conclusion to you, with their recommendations as to the form of central

The larger administrative divisions

government to be established for the purpose of taking over the control.

The commission to have certain legislative power.

Beginning with the first day of September, 1900, the authority to exercise, subject to my approval, through the Secretary of War, that part of the power of government in the Philippine Islands which is of a legislative nature is to be transferred from the military governor of the islands to this commission, to be thereafter exercised by them in the place and stead of the military governor, under such rules and regulations as you shall prescribe, until the establishment of the civil central government for the islands contemplated in the last foregoing paragraph, or until Congress shall otherwise provide. Exercise of this legislative authority will include the making of rules and orders having the effect of law, for the raising of revenue by taxes, customs duties, and imposts; the appropriation and expenditure of public funds of the islands; the establishment of an educational system throughout the islands; the establishment of a system to secure an efficient civil service; the organization and establishment of courts; the organization and establishment of municipal and departmental governments, and all other matters of a civil nature for which the military governor is now competent to provide by rules or orders of a legislative character.

The appointment of officers.

The commission will also have power during the same period to appoint to office such officers under the judicial, educational and civil service systems and in the municipal and departmental governments as shall be provided for. Until the complete transfer of control, the military governor will remain the chief executive head of the government of the islands, and will exercise the executive authority now possessed by him and not herein expressly assigned to the commission, subject however to the rules and orders enacted by the commission in the exercise of the legislative powers conferred upon them. In the meantime the municipal and departmental governments will continue to report to the military governor and be subject to his administrative supervision and control, under your direction, but that supervision and control will

be confined within the narrowest limits consistent with the requirement that the powers of government in the municipalities and departments shall be honestly and effectively exercised and that law and order and individual freedom shall be maintained. . . .

Preference for natives.

The many different degrees of civilization and varieties of customs and capacity among the people of the different islands preclude very definite instruction as to the part which the people shall take in the selection of their own officers but these general rules are to be observed: That in all cases the municipal officers, who administer the local affairs of the people, are to be selected by the people, and that whenever officers of more extended jurisdiction are to be selected in any way, natives of the islands are to be preferred, and if they can be found competent and willing to perform the duties, they are to receive the offices in preference to any others.

It will be necessary to fill some offices for the present with Americans which after a time may well be filled by natives of the islands. As soon as practicable a system of ascertaining the merit and fitness of candidates for civil office should be put in force. An indispensable qualification for all offices and positions of trust and authority in the islands must be absolute and unconditional loyalty to the United States, and absolute and unhampered authority and power to remove and punish any officer deviating from that standard must at all times be retained in the hands of the central authority of the islands.

The fundamental guiding principle.

In all the forms of government and administrative provisions which they are authorized to prescribe the commission should bear in mind that the government which they are establishing is designed not for our satisfaction or for the expression of our theoretical views, but for the happiness, peace and prosperity of the people of the Philippine Islands, and the measures adopted should be made to conform to their customs, their habits, and even their prejudices, to the fullest extent consistent with the accomplishment of the indispensable requisites of just and effective government.

At the same time the commission should bear in mind and the people of the islands should be made plainly to understand that there are certain great principles of government which have been made the basis of our governmental system which we deem essential to the rule of law and the maintenance of individual freedom, and of which they have, unfortunately, been denied the experience possessed by us; that there are also certain practical rules of government which we have found to be essential to the preservation of these great principles of liberty and law, and that these principles and these rules of government must be established and maintained in their islands for the sake of their liberty and happiness, however much they may conflict with their customs or laws of procedure with which they are familiar. . . .

Some inviolable rules.

Upon every division and branch of the government of the Philippines therefore must be imposed these inviolable rules:

That no person shall be deprived of life, liberty, or property without due process of law; that private property shall not be taken for public use without just compensation; that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense; that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted; that no person shall be put twice in jeopardy for the same offense or be compelled in any criminal case to be a witness against himself; that the right to be secure against unreasonable searches and seizures shall not be violated; that neither slavery nor involuntary servitude shall exist except as a punishment for crime; that no bill of attainder or *ex post facto* law shall be passed; that no law shall be passed abridging the freedom of speech or of the press or the rights of the people to peaceably assemble and petition the government for a redress of grievances; that no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof; and that the free exercise

and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed. . . .

157. *The Philippine Assembly*

The following proclamation issued by President Roosevelt on March 28, 1907, describes the steps taken under the act of 1902, by which a general election was called in the islands for the choice of delegates to a Philippine assembly: —

Provision for a census.

Whereas by the sixth section of the act of Congress approved July first, nineteen hundred and two, entitled "An act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes," it was provided "That whenever the existing insurrection in the Philippine Islands shall have ceased, and a condition of general and complete peace shall have been established therein, and the fact shall be certified to the President of the Philippine Commission, the President, upon being satisfied thereof shall order a census of the Philippine Islands to be taken by said Philippine Commission;" and

Conditions warranting the call of the assembly

Whereas by the seventh section of said act it was provided: "That two years after the completion and publication of the census, in case such condition of general and complete peace with recognition of the authority of the United States, shall have continued in the territory of said islands, not inhabited by Moros or other non-Christian tribes, and such facts shall have been certified to the President by the Philippine Commission, the President, upon being satisfied thereof, shall direct said Commission to call, and the Commission shall call, a general election for the choice of delegates to a popular assembly of the people of said territory in the Philippine Islands, which shall be known as the Philippine Assembly. After said Assembly shall have convened and organized, all the legislative power heretofore conferred on the Philippine Commission in all that part of said Islands not inhabited by Moros or other non-Christian tribes shall be vested in the legislature consisting of two houses — the Philippine Commission and

the Philippine Assembly. Said Assembly shall consist of not less than fifty nor more than one hundred members, to be apportioned by said Commission among the provinces as nearly as practicable according to population, *Provided*, That no province shall have less than one member: *And, provided further*, That provinces entitled by population to more than one member may be divided into such convenient districts as the said Commission may deem best;" and

The census taken and published.

Whereas on September 8, 1902, the Philippine Commission certified to me that the insurrection of the Philippine Islands had ceased, and that a condition of general and complete peace had been established therein; and

Whereas in pursuance of the provisions of the law above quoted, and upon the foregoing due certification, and being satisfied of the facts therein stated, on the 25th day of September, 1902, I ordered a census of the Philippine Islands to be taken by the Philippine Commission; and

Whereas, the census so ordered was taken and announcement of its completion and publication made to the people of the Philippine Islands on March 28, 1905; and

The commission advises the President.

Whereas the Philippine Commission has now certified to me the following resolution:

"Whereas the census of the Philippine Islands was completed and published, on the 27th day of March, 1905, which said completion and publication of said census was, on the 28th day of March, 1905, duly published and proclaimed to the people by the governor-general of the Philippine Islands with the announcement that the President of the United States would direct the Philippine Commission to call a general election for the choice of delegates to a popular assembly, provided that a condition of general and complete peace, with recognition of the authority of the United States, should be certified by the Philippine Commission to have continued in the territory of the Philippine Islands for a period of two years after said completion and publication of said census; and

"Whereas since the completion and publication of said census, there have been no serious disturbances of the public order save and except those caused by the noted outlaws and bandit chieftains, Felizardo and Montalon, and their followers in the provinces of Cavite and Batangas, and those caused in the provinces of Samar and Leyte by the non-Christian and fanatical pulajanes resident in the mountain districts of the said provinces, and the barrios contiguous thereto; and

Good order generally maintained in the islands.

"Whereas the overwhelming majority of the people of said provinces of Cavite, Batangas, Samar, and Leyte have not taken part in said disturbances and have not aided nor abetted the lawless acts of said bandits and pulajanes; and

"Whereas the great mass and body of Philippine people have, during said period of two years, continued to be law abiding, peaceful and loyal to the United States, and have continued to recognize and do now recognize the authority and sovereignty of the United States in the territory of said Philippine Islands, Now therefore be it

"Resolved by the Philippine Commission in formal session duly assembled, that it, said Philippine Commission, do certify and does hereby certify to the President of the United States that for a period of two years after the completion and publication of the census a condition of general and complete peace with recognition of the authority of the United States, has continued to exist, and now exists in the territory of said Philippine Islands, not inhabited by Moros or other non-Christian tribes; and be it further

"Resolved by said Philippine Commission, That the President of the United States be requested and is hereby requested to direct said Philippine Commission to call a general election for the choice of delegates to a popular assembly of the people of said territory in the Philippine Islands, which assembly shall be known as the Philippine Assembly;"

Now, therefore, I, Theodore Roosevelt, President of the United States, in pursuance of the provisions of the law above cited, and

Proclamation calling the election.

being satisfied of the facts certified to me by the Philippine Commission do hereby direct said Philippine Commission to call a general election for the choice of delegates to a popular assembly of the people of the territory of the Philippine Islands not inhabited by the Moros or other non-Christian tribes which shall be known as the Philippine Assembly.

THEODORE ROOSEVELT.

The White House, March 28, 1907.

158. *The Organization of Government in Porto Rico*

These extracts from the organic law of Porto Rico give the principal sections dealing with the form of government for that dependency: —

SEC. 6. That the capital of Porto Rico shall be at the city of San Juan and the seat of government shall be maintained there.

Status of the inhabitants.

SEC. 7. That all inhabitants continuing to reside therein who were Spanish subjects on the eleventh day of April, eighteen hundred and ninety-nine, and then resided in Porto Rico, and their children born subsequent thereto, shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain on or before the eleventh day of April, nineteen hundred, in accordance with the provisions of the treaty of peace between the United States and Spain entered into on the eleventh day of April, eighteen hundred and ninety-nine; and they, together with such citizens of the United States as may reside in Porto Rico, shall constitute a body politic under the name of The People of Porto Rico, with governmental powers as hereinafter conferred, and with power to sue and be sued as such.

The chief executive.

SEC. 17. That the official title of the chief executive officer shall be "The Governor of Porto Rico." He shall be appointed by the President, by and with the advice and consent of the Senate; he shall hold his office for a term of four years and until his successor is chosen and qualified unless sooner removed by the Presi-

dent; he shall reside in Porto Rico during his official incumbency, and shall maintain his office at the seat of government; he may grant pardons and reprieves, and remit fines and forfeitures for offenses against the laws of Porto Rico, and respites for offenses against the laws of the United States, until the decision of the President can be ascertained; he shall commission all officers that he may be authorized to appoint, and may veto any legislation enacted, as hereinafter provided; he shall be the commander in chief of the militia, and shall at all times faithfully execute the laws, and he shall in that behalf have all the powers of governors of the Territories of the United States that are not locally inapplicable; and he shall annually, and at such other times as he may be required, make official report of the transactions of the government in Porto Rico, through the Secretary of State, to the President of the United States: *Provided*, That the President may in his discretion, delegate and assign to him such executive duties and functions as may in pursuance with law be so delegated and assigned.

The executive officials and council.

SEC. 18. That there shall be appointed by the President, by and with the advice and consent of the Senate, for the period of four years, unless sooner removed by the President, a secretary, an attorney-general, a treasurer, an auditor, a commissioner of the interior, and a commissioner of education, each of whom shall reside in Porto Rico during his official incumbency and have the powers and duties hereinafter provided for them, respectively, and who, together with five other persons of good repute, to be also appointed by the President for a like term of four years, by and with the advice and consent of the Senate, shall constitute an executive council, at least five of whom shall be native inhabitants of Porto Rico, and, in addition to the legislative duties hereinafter imposed upon them as a body, shall exercise such powers and perform such duties as are hereinafter provided for them, respectively, and who shall have power to employ all necessary deputies and assistants for the proper discharge of their duties as such officials and as such executive council.

The legislature.

SEC. 27. That all local legislative powers hereby granted shall be vested in a legislative assembly which shall consist of two houses; one the executive council, as hereinbefore constituted, and the other a house of delegates, to consist of thirty-five members elected biennially by the qualified voters as hereinafter provided; and the two houses thus constituted shall be designated "The legislative assembly of Porto Rico."

SEC. 28. That for the purposes of such elections Porto Rico shall be divided by the executive council into seven districts, composed of contiguous territory and as nearly equal as may be in population, and each district shall be entitled to five members of the house of delegates. . . .

PART III

STATE GOVERNMENT

CHAPTER XXII

THE CONSTITUTIONAL BASIS OF STATE GOVERNMENT

159. *Federal Limitations on State Authorities*

IN addition to constructing a system of government endowed with certain powers, the framers of the federal Constitution drew about the states a cordon of restrictions in favor of national interests and private rights, and at the close of the Civil War these limitations were supplemented by amendments of the most fundamental character. Within the sphere of power thus marked out in the Constitution all state authorities must operate under the supervision of the federal judiciary.

Article I, Section 10, of the federal Constitution.

1. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility.

2. No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of the Congress.

3. No State shall, without the consent of Congress, lay any

duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war unless actually invaded, or in such imminent danger as will not admit of delay.

From Article IV of the federal Constitution.

1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

2. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

No person held to service or labor in one State under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

4. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and, on application of the Legislature, or of the executive (when the Legislature cannot be convened), against domestic violence.

Article XIII

Amendments to the federal Constitution.

1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

2. Congress shall have power to enforce this article by appropriate legislation.

Article XIV

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a senator or representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid and comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions

and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

5. The Congress shall have power to enforce by appropriate legislation the provisions of this article.

Article XV

1. The right of the citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude.

2. The Congress shall have power to enforce by appropriate legislation the provisions of this article.

160. *The Police Power of the State*

The police power of the state is rightly called "the dark continent" of American constitutional law, because it is the vague and undefinable authority for acting in the name of the public welfare, which the state retains in spite of the restrictions imposed by the federal Constitution. The Supreme Court refuses to establish the limits of this authority in the abstract, but it is constantly deciding whether specific acts of the states are warranted under the police power, or are outside that sphere. The subject is thus discussed by the Court: —

The general limitations imposed by the fourteenth Amendment.

The Fourteenth Amendment, in declaring that no State "shall deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws" undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property;

that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediments should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences.

No amendment interferes with the police power.

But neither this Amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits, — for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. . . . .

What constitutes an exercise of the police power.

The extent and limits of what is known as the "police power" have been a fruitful subject of discussion in the appellate courts of every State in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement by summary proceedings

of whatever may be regarded as a public nuisance. Under this power it has been held that the State may order the destruction of a house falling to decay, or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill-fame; and the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. To justify the State in thus interposing its authority on behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not under the guise of protecting public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts. . . .

hen
licial pro-
edings are
quired.

It is not easy to draw the line between cases where property illegally used may be destroyed summarily [under the police power] and where judicial proceedings are necessary for its condemnation. If the property were of great value, as for instance, if it were a vessel employed for smuggling or other illegal purposes,

it would be putting a dangerous power in the hands of a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such an act as depriving him of his property without due process of law. But where the property is of trifling value, and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the legislature to order its summary abatement. For instance, if the legislature should prohibit the killing of fish by explosive shells, and should order the cartridges so used to be destroyed, it would seem like the belittling of the judiciary to require such destruction to be preceded by a solemn condemnation in a court of justice.

161. *How a Territory Is Authorized to Form a Constitution*

Although the inhabitants of a territory may, on their own authority, call a convention, frame a constitution, and ask Congress for admission into the Union, the more regular method is to secure permission from Congress to take the preliminary steps in the establishment of self-government. This extract from the enabling act for the territory of Utah illustrates the process, and also shows how Congress may impose restrictions on new states before their admission.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That the inhabitants of all that part of the area of the United States now constituting the Territory of Utah, as at present described, may become the State of Utah, as hereinafter provided.

The election of the members of the convention.

Sec. 2. That all male citizens over the age of twenty-one years, who have resided in said Territory for one year next prior to such election, are hereby authorized to vote for and choose delegates to form a Convention in said Territory. Such delegates shall possess the qualifications of such electors; and the aforesaid Convention shall consist of one hundred and seven delegates, apportioned among the several counties within the limits of the proposed State. . . .

he con-
ntion to
ame a
nstitution.

Sec. 3. That the delegates to the Convention thus elected shall meet at the seat of government of said Territory on the first Monday in March, eighteen hundred and ninety-five, and, after organization, shall declare on behalf of the people of said proposed State that they adopt the Constitution of the United States, whereupon the said Convention shall be, and is hereby, authorized to form a Constitution and State government for said proposed State.

imitations
i the con-
itution.

The Constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not to be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. And said Convention shall provide, by ordinance irrevocable without the consent of the United States and the people of said State —

First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship: *Provided*, That polygamous or plural marriages are forever prohibited. . . .

Fourth. That provision shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of said State and free from sectarian control.

estrictions
i to schools.

Sec. 11. The schools, colleges, and university provided for in this act, shall forever remain under the exclusive control of said State, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes or of the income thereof, shall be used for the support of any sectarian or denominational school, college, or university.

ow the
ate may be
lmitted
to the
nion.

Sec. 19. That the Constitutional Convention may, by ordinance, provide for the election of officers for a full State government, including members of the Legislature and Representative in the Fifty-fourth Congress, at the time of the election for the ratification or rejection of the Constitution; but the said State government shall remain in abeyance until the State shall be admitted into the Union as proposed by this act. In case the Consti-

tution of said State shall be ratified by the people, but not otherwise, the Legislature thereof may assemble, organize and elect two Senators of the United States in the manner now prescribed by the laws of the United States; and the Governor and Secretary of State of the proposed State shall certify the election of the Senators and Representative in the manner required by law, and when such State is admitted into the Union, as provided in this act, the Senators and Representative shall be entitled to be admitted to seats in Congress, and to all rights and privileges of Senators and Representatives of other States in the Congress of the United States; and the State government formed in pursuance of said Constitution as provided by the Constitutional Convention, shall proceed to exercise all the functions of State officers; and all laws in force made by said Territory at the time of its admission into the Union shall be in force in said State, except as modified or changed by this act or by the Constitution of the State; and the laws of the United States shall have the same force and effect within the said State as elsewhere within the United States. . . .

162. *Suffrage Qualifications in the State of New York*

The constitution of the state of New York prescribes the following qualifications for voters and lays down the fundamental conditions under which the rights of the suffrage must be exercised.

Article II

Section 1. Every male citizen of the age of twenty-one years, who shall have been a citizen for ninety days, and an inhabitant of this State one year next preceding an election, and for the last four months a resident of the county, and for the last thirty days a resident of the election district in which he may offer his vote, shall be entitled to vote at such election in the election district of which he shall at the time be a resident, and not elsewhere, for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to a vote of the

Qualifications of voters.

people, provided that in time of war no elector in the actual military service of the State, or of the United States, in the army or navy thereof, shall be deprived of his vote by reason of his absence from such election district; and the Legislature shall have power to provide the manner in which and the time and place at which such absent electors may vote, and for the return and canvass of their votes in the election districts in which they respectively reside.

rsons cluded m the ffrage.

§ 2. No person who shall receive, accept, or offer to receive, or pay, offer or promise to pay, contribute, offer or promise to contribute to another, to be paid or used, any money or other valuable thing as a compensation or reward for the giving or withholding a vote at an election, or who shall make any promise to influence the giving or withholding any such vote, or who shall make or become directly or indirectly interested in any bet or wager depending upon the result of any election, shall vote at such election; and upon challenge for such cause, the person so challenged, before the officers authorized for that purpose shall receive his vote, shall swear or affirm before such officers that he has not received or offered, does not expect to receive, has not paid, offered or promised to pay, contributed, offered or promised to contribute to another, to be paid or used, any money or other valuable thing as a compensation or reward for the giving or withholding a vote at such election, and has not made any promise to influence the giving or withholding of any such vote, nor made or become directly or indirectly interested in any bet or wager depending upon the result of such election. The Legislature shall enact laws excluding from the right of suffrage all persons convicted of bribery or any infamous crime.

sidence t affected certain cupations.

§ 3. For the purpose of voting, no person shall be deemed to have gained or lost a residence, by reason of his presence or absence, while employed in the service of the United States; nor while engaged in the navigation of the waters of this State, or of the United States, or of the high seas; nor while a student of any seminary of learning; nor while kept at any almshouse, or other

asylum, or institution wholly or partly supported at public expense or by charity; nor while confined in any public prison.

§ 4. Laws shall be made for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage hereby established, and for the registration of voters; which registration shall be completed at least ten days before each election. Such registration shall not be required for town and village elections except by express provision of law. In cities and villages having five thousand inhabitants or more, according to the last preceding state enumeration of inhabitants, voters shall be registered upon personal application only; but voters not residing in such cities or villages shall not be required to apply in person for registration at the first meeting of the officers having charge of the registry of voters. Registration and election laws.

§ 5. All elections by the citizens, except for such town officers as may by law be directed to be otherwise chosen, shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting be preserved.

§ 6. All laws creating, regulating or affecting boards of officers charged with the duty of registering voters, or of distributing ballots at the polls to voters, or of receiving, recording or counting votes at elections, shall secure equal representation of the two political parties which, at the general election next preceding that for which such boards or officers are to serve, cast the highest and the next highest number of votes. All such boards and officers shall be appointed or elected in such manner, and upon the nomination of such representatives of said parties respectively, as the Legislature may direct. Existing laws on this subject shall continue until the Legislature shall otherwise provide. This section shall not apply to town meetings, or to village elections. Bi-partisan boards.

163. *The Exclusion of Negroes from the Suffrage*

This section from the Virginia constitution of 1902 illustrates some of the many ways which have been devised in Southern states to exclude most of the negroes from the suffrage without

at the same time disfranchising any considerable number of white voters.

Who may register as voters.

There shall be general registrations in the counties, cities and towns of the State during the years of nineteen hundred and two and nineteen hundred and three at such times and in such manner as may be prescribed by an ordinance of this Convention. At such registrations every male citizen of the United States having the qualifications of age and residence required in section Eighteen shall be entitled to register, if he be:

First. A person, who prior to the adoption of this Constitution, served in time of war in the army or navy of the United States, of the Confederate States, or of any State of the United States or of the Confederate States; or,

Second. A son of any such person; or,

Third. A person, who owns property, upon which, for the year next preceding that in which he offers to register, state taxes aggregating at least one year have been paid; or,

Fourth. A person able to read any section of this Constitution submitted to him by the officers of registration and to give a reasonable explanation of the same; or, if unable to read such section, able to understand and give a reasonable explanation thereof when read to him by the officers.

The preservation of the roll.

A roll containing the names of all persons thus registered, sworn to and certified by the officers of registration, shall be filed, for record and preservation, in the clerk's office of the circuit court of the county, or the clerk's office of the corporation court of the city, as the case may be. Persons thus enrolled shall not be required to register again, unless they shall have ceased to be residents of the State, or become disqualified by section Twenty-three.

At the close of the Louisiana constitutional convention of 1898, Hon. Thomas J. Semmes, chairman of the judiciary committee, made the following defense of the policy of restricting political power to the white population of the state.

Mr. President and Gentlemen of the Convention:

Now we have gotten through with our work. It is about to go

forth throughout the length and breadth of this State to be submitted to the criticisms of the people. This is the work of a Democratic Convention. This is the work of the Democratic party of the State, represented by its selected agents appointed to do that work. If we have done any thing wrong, any thing which will involve the dissolution or disintegration or defeat of the Democratic party, then we ought to be condemned. It has been stated in some quarters that we have been actuated to a certain extent by party spirit. Granted. What of it? What is the State? It is the Democratic party. (Applause.) What are the people of the State? They are the Democracy of the State, and when you eliminate the Democratic party or the Democracy of the State from the State, what is there left but that which we came here to suppress? I don't allude to the fragments of what is called the Republican party. We met here to establish the supremacy of the white race, and the white race constitutes the Democratic party of this State. There is, therefore, in my judgment, no separation whatever between the interests of the State and those of the Democratic party, and if we are to be subjected to criticism because our ordinances may have been colored, with the view, in some instances, of promoting the interests of the Democratic party, as those interests are not separated from the State, I feel no hesitancy in saying that we have done no injury to the State.

The state is the Democratic party.

It is said that we sought to establish our party in power. Wherever there were political questions involved, of course, we looked to the interests of the party, because they are the interests of the State. Whoever heard of a political party being in the ascendancy, and in power and undertaking to do any act to remove that ascendancy or to impair their power? Look throughout the nations of Europe. In all of their political matters; in all of their statesmanship; those who are in power seek to maintain it, and, with that power to promote the interests of the State which they govern. If it is so as to nations, it is so as to parties. Does the Republican party throughout the United States ever do any act without looking to the interests of the party, as well as to the interests of the

The Democratic party must maintain ascendancy.

nation? And have they not remained in the ascendancy for years? Do we, who have obtained the ascendancy but recently in this State, wish the Democratic party to do any act by which its ascendancy shall be impaired? It is absolutely absurd.

White manhood suffrage established.

Now then, what have we done? is the question. Our mission was, in the first place, to establish the supremacy of the white race in this State to the extent to which it could be legally and constitutionally done, and what has our ordinance on suffrage, the constitutional means by which we hope to maintain that ascendancy, done? We have established throughout the State white manhood suffrage. A great cry went out that there should be a poll tax; that there should be an educational test; that as a qualification for a voter, he should be a property owner. We have in the ordinance established those qualifications which are necessary to be possessed in order to entitle these citizens to vote. . . .

No former voter to be disfranchised.

But a hue and cry has been raised by people who are entirely ignorant of the fact which we have shown, against what is called section 5 of the ordinance on suffrage. Now, what is section 5? Very few people know anything about it. Very few people understand its effects. They have taken their ideas from outside criticism and suppose that we have committed some very great wrong. I repeat, what is section 5? It is a declaration on the part of this Convention, that no white man in this State — that's the effect but not the language — that no white man in this State who has heretofore exercised the right of suffrage shall be deprived of it, whether or not he can read or write, or whether he possesses the property qualification. That is the meaning of it; nothing more and nothing less. It declares that every white man between now and the 1st day of September next, although he may not be able to read and write, although he does not possess the property qualification, may, notwithstanding, if he register himself pursuant to this ordinance of the Constitution, be thereafter entitled to vote. . . .

The exception made on account of illiteracy.

Now, why was this exception made? Because, and I am ashamed to say it, Louisiana is one of the most illiterate States

in the Union. It is more illiterate than any other State except North Carolina. We, therefore, have in this State a large white population whose right to vote would have been stricken down but for the operation of section 5. And all of these men had aided the white people of the State to wrest from the hands of the Republican party, composed almost exclusively of negroes, the power which, backed by Federal bayonets, they had exercised for many years. Now can we go to them, these men who stood side by side with us in the dark days of reconstruction and say to them that a convention of Louisianians has deprived them of the right to vote? Could we face these men who have always been Democrats; who have always aided us in achieving the ascendancy of the Democratic party in this State with such a record as that?

164. *Arguments on Woman's Suffrage*

The question of woman's suffrage was debated at length in the New York constitutional convention of 1894, and in the course of the discussion, Mr. Hirschberg made the following argument against granting the vote to women.

Granting the suffrage an injury to the state and to women.

Now, Mr. President, I have listened to the speeches which have been delivered here by the supporters of this movement, and on the merits of the question remain unconvinced. The burden of the case rests with those who would disturb the existing order of things, and to my mind, nothing has been urged by them which should carry conviction. There has been considerable inflammatory declamation, a great deal of emotional sentiment, some rhetorical denunciation, a little good-natured poetical and trenchant buffoonery, but of pure and powerful argument calculated to satisfy the sober judgment that the State is ripe for female government and control, there has been nothing. No advocate of the measure has demonstrated that active participation in the affairs of the State can be assumed at this time by our female citizens without injury to both. Until that is done — until it is shown that woman may become a politician without losing something of the precious charm of her personality, and that the State may exact her services

in that capacity without imperilling its stability and tranquillity, it is surely the conservative course of wisdom to retain the existing conditions under which we have achieved our great happiness and prosperity.

The present position of woman is enviable.

The present position of woman in this State is most enviable. She has education in its fullest and highest development. She has the absolute and unfettered ownership of her property. Every avenue of trade for which she is fitted physically is freely opened to her and in the enjoyment of her rights she is protected by equal laws, which are jealously and even sympathetically enforced for her benefit. Never has there been a time in the history of the world when her happiness has been so assured, her advancement so stimulated and encouraged, or her independence, within the limits of her physical possibilities and the necessity of a continuance of her domestic dominion, so ample and so protected. In the domains of science, of art, of literature, and of charitable and religious labor, her position is that of a specially-invited and a favored worker. And with it all, she is still permitted to retain her essentially sweet and feminine qualities, which draw to her the respect, the deference and the homage of man, commensurate in its nature, extent, intensity and chivalry with the ennobling advancement of our civilization. She rules at the fire-side, in the school-room, by the bed of pain and in the temples of charity; and her powerful influence pervades every department of human endeavor, industry and enlightenment, unmixed with baser matter. She is recognized as the great and tender ameliorating factor in every relation of our complex life.

Woman should not be dragged into political strife.

I would not drag her down from this high and favored position at the instigation of thoughtless agitators to take her chances in the turmoil of our political life without the clearest evidence that it is necessary for the maintenance of her independence and the preservation of her happiness. I would not apply the flame of partisan strife to the fuel of domestic discord. I would not endanger the quiet of our homes by an additional element of disruption, of contention, of bitterness and animosity, under circum-

stances, in which if there is union, the same voice would still be uttered at the polls, but in which, if there should be independent and differing thought and action, the house would become inevitably and forever divided against itself. (Applause.)

Conditions under which the suffrage might be granted.

Should the time ever come when woman herself, by a fair preponderance in number, demands the ballot, and public opinion supports the demand with an unmistakeable voice and emphasis, and should the time also come when party politics shall be so pure that the presence of woman at the polls would not be incongruous, and party feeling so subdued that opposition from those we love could be freely tolerated by our better natures, the experiment of female suffrage might possibly be safely tried; but until then let woman be content with her present exalted and advancing sphere; developing to the fullest degree, within the lines and limits of her sexuality, all her capabilities for the good of humanity; rendering her share to the sum of civic happiness in the practice of domestic virtues; freed from the burdens of State which she is unfitted to endure, either in its defense in war or in its police in peace; not directly shaping its policy or framing and enforcing its government, but exercising an influence both powerful and benign in the education, the nurture and training of its youth; depending for her advancement on the strength of her innate womanly power, and for her protection on a manhood which has as yet never failed her.

This argument in favor of granting votes to women is taken from the long and eloquent address delivered by Mr. George William Curtis before the New York constitutional convention of 1867.

On what grounds does exclusion rest?

I wish to know, sir, and I ask in the name of the political justice and consistency of this State, why it is that half of the adult population, as vitally interested in good government as the other half, who own property, manage estates, and pay taxes, who discharge all the duties of good citizens and are perfectly intelligent and capable, are absolutely deprived of political power, and classed with lunatics and felons. The boy will become a man and a voter; the

lunatic may emerge from the cloud and resume his rights; the idiot, plastic under the tender hand of modern science, may be moulded into a full citizen; the criminal whose hand still drips with the blood of his country and of liberty may be pardoned and restored. But no age, no wisdom, no peculiar fitness, no public service, no effort, no desire can remove from women this enormous and extraordinary disability. Upon what reasonable grounds does it rest? Upon none whatever. It is contrary to natural justice, to the acknowledged and traditional principles of the American government, and to the most enlightened political philosophy. . . .

'he political ıfluence of omen at resent.

Or shall I be told that women, if not numerically counted at the polls, do yet exert an immense influence upon politics, and do not really need the ballot? If this argument were seriously urged, I should suffer my eyes to rove through this chamber and they would show the many honorable gentlemen of reputed political influence. May they, therefore, be properly and justly disfranchised? I ask the honorable chairman of the committee whether he thinks that a citizen should have no vote because he has influence? What gives influence? Ability, intelligence, honesty. Are these to be excluded from the polls? Is it only stupidity, ignorance, and rascality which ought to possess political power? . . .

ioes oman's ork interre with ɔting?

But I shall be told, in the language of the report of the committee, that the proposition is openly at war with the distribution of functions and duties between the sexes. Translated into English, Mr. Chairman, this means that it is unwomanly to vote. Well, sir, I know that at the very mention of the political rights of women there arises in many minds a dreadful vision of a mighty exodus of the whole female world, in bloomers and spectacles, from the nursery and kitchen to the polls. It seems to be thought that if women practically took part in politics, the home would instantly be left a howling wilderness of cradles and a chaos of undarned stockings and buttonless shirts. But how is it with men? Do they desert their workshops, their plows and offices, to pass their time at the polls? Is it a credit to a man to be called a professional politician? The pursuits of men in the world, to which they are

directed by the natural aptitude of sex and to which they must devote their lives, are as foreign from political functions as those of women. To take an extreme case. There is nothing more incompatible with political duties in cooking and taking care of children than there is in digging ditches or making shoes or in any other necessary employment, while in every superior interest of society growing out of the family the stake of women is not less than men, and their knowledge is greater. . . .

Has woman less at stake in good government

When the committee declare that voting is at war with the distribution of functions between the sexes, what do they mean? Are not women as much interested in good government as men? Has the mother less at stake in equal laws honestly administered than the father? There is fraud in the legislature; there is corruption in the courts; there are hospitals and tenement-houses and prisons; there are gambling houses and billiard-rooms and brothels; there are grog-shops at every corner, and I know not what enormous proportion of crime in the State proceeds from them; there are forty thousand drunkards in the State and their hundreds of thousands of children. All these things are subjects of legislation, and under the exclusive legislation of men; the crime associated with all these things becomes vast and complicated; have the wives and mothers and sisters of New York less vital interest in them, less practical knowledge of them and their proper treatment, than the husbands and fathers? No man is so insane as to pretend it. Is there then any natural incapacity in women to understand politics? It is not asserted. Are they lacking in the necessary intelligence? But the moment that you erect a standard of intelligence which is sufficient to exclude women as a sex, that moment most of their amiable fellow-citizens in trousers would be disfranchised. Is it that they ought not to go to public political meetings? But we earnestly invite them. Or that they should not go to the polls? Some polls, I allow, in the larger cities, are dirty and dangerous places, and those it is the duty of the police to reform. But no decent man wishes to vote in a grog-shop, or to have his head broken while he is doing it; while the mere act of dropping a ballot

in a box is about the simplest, shortest, and cleanest that can be done.

Last winter Senator Frelinghuysen, repeating, I am sure thoughtlessly, the common rhetoric of the question, spoke of the high and holy mission of women. But if people with a high and holy mission may innocently sit bare-necked in hot theatres to be studied through pocket telescopes until midnight by anyone who chooses, how can their high and holy mission be harmed by their quietly dropping a ballot in a box? But if women vote, they must sit on juries. Why not? Nothing is plainer than that thousands of women who are tried every year as criminals are not tried by their peers. And if a woman is bad enough to commit a heinous crime, must we absurdly assume that women are too good to know that there is such a crime? If they may not sit on juries, certainly they ought not to be witnesses.

CHAPTER XXIII

POPULAR CONTROL IN STATE GOVERNMENTS

165. *The New York Amendment System*

EVERY well-planned state constitution should provide a definite process by which the voters may amend or reconstruct their fundamental institutions. The system created by Article XIV of the New York constitution is regarded by many publicists as one of the most complete and satisfactory to be found anywhere in the United States.[1]

The ordinary method of amendment.

Section 1. Any amendment or amendments to this constitution may be proposed in the Senate and Assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, and the yeas and nays taken thereon, and referred to the Legislature to be chosen at the next general election of senators, and shall be published for three months previous to the time of making such choice; and if in the Legislature so next chosen, as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the Legislature to submit such proposed amendment or amendments to the people for approval in such manner and at such times as the Legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become a part of the Constitution from and after the first day of January next after such approval.

§ 2. At the general election to be held in the year one thousand nine hundred and sixteen, and every twentieth year thereafter, and

[1] See the valuable article by Professor J. W. Garner in *The American Political Science Review* for February, 1907.

mendment r a con- itutional nvention.

also at such times as the Legislature may by law provide, the question, "Shall there be a convention to revise the Constitution and amend the same?" shall be decided by the electors of the State; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of every senate district of the State, as then organized, shall elect three delegates at the next ensuing general election at which members of the Assembly shall be chosen, and the electors of the State voting at the same election shall elect fifteen delegates-at-large. The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed. Every delegate shall receive for his services the same compensation and the same mileage as shall then be annually payable to the members of the Assembly. A majority of the convention shall constitute a quorum for the transaction of business, and no amendment to the Constitution shall be submitted for approval to the electors as hereinafter provided, unless by the assent of a majority of all the delegates elected to the convention, the yeas and nays being entered on the journal to be kept. The convention shall have the power to appoint such officers, employés and assistants as it may deem necessary and fix their compensation, and to provide for the printing of its documents, journal and proceedings. The convention shall determine the rules of its own proceedings, choose its own officers, and be the judge of the election, returns and qualifications of its members. In case of a vacancy, by death, resignation or other cause, of any district delegate elected to the convention, such vacancy shall be filled by a vote of the remaining delegates representing the district in which such vacancy occurs. If such vacancy occurs in the office of a delegate-at-large, such vacancy shall be filled by a vote of the remaining delegates-at-large.

atification.

Any proposed constitution or constitutional amendment which shall have been adopted by such convention, shall be submitted to a vote of the electors of the State at the time and in the manner provided by such convention, at an election which shall be held not

less than six weeks after the adjournment of such convention. Upon the approval of such constitution or constitutional amendments, in the manner provided in the last preceding section, such constitution or constitutional amendment, shall go into effect on the first day of January next after such approval.

Coinciden amend- ments.

§ 3. Any amendment proposed by a constitutional convention relating to the same subject as an amendment proposed by the Legislature, coincidently submitted to the people for approval at the general election held in the year one thousand eight hundred and ninety-four, or at any subsequent election shall, if approved, be deemed to supersede the amendment so proposed by the Legislature.

166. *The Initiative and Referendum in Oklahoma*

These sections from the recent constitution of Oklahoma give the broad outlines of the system of initiative and referendum established in that state: —

Reservatic of power t the people

Section 1. The legislative authority of the State shall be vested in a legislature, consisting of a senate and a house of representatives; but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the legislature, and also reserve power at their own option to approve or reject at the polls any act of the legislature.

The initia tive and re erendum.

Sec. 2. The first power reserved by the people is the initiative, and eight per centum of the legal voters shall have the right to propose any legislative measure, and fifteen per centum of the legal voters shall have the right to propose amendments to the Constitution by petition, and every such petition shall include the full text of the measure so proposed. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety), either by petition signed by five per centum of the legal voters or by the Legislature as other bills are enacted. The ratio and per centum of legal voters hereinbefore stated shall be based upon the

total number of votes cast at the last general election for the State office receiving the highest number of votes at such election.

Sec. 3. Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the Legislature which passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures voted on by the people. All elections on measures referred to the people of the State shall be had at the next election held throughout the State, except when the Legislature or the Governor shall order a special election for the express purpose of making such reference. Any measure referred to the people by the initiative shall take effect and be in force when it shall have been approved by a majority of the votes cast in such election. Any measure referred to the people by the referendum shall take effect and be in force when it shall have been approved by a majority of the votes cast thereon and not otherwise.

The style of all bills shall be: "Be It Enacted by the People of the State of Oklahoma."

Petitions and orders for the initiative and for the referendum shall be filed with the Secretary of State and addressed to the Governor of the State, who shall submit the same to the people. The Legislature shall make suitable provisions for carrying into effect the provisions of this article.

Sec. 4. The referendum may be demanded by the people against one or more items, sections, or parts of any act of the Legislature in the same manner in which such power may be exercised against a complete act. The filing of a referendum petition against one or more items, sections, or parts of an act shall not delay the remainder of such act from becoming operative.

ocal government.

Sec. 5. The powers of the initiative and referendum reserved to the people by this Constitution for the State at large, are hereby further reserved to the legal voters of every county and district therein, as to all local legislation, or action, in the administration of county and district government in and for their respective counties and districts.

The manner of exercising said powers shall be prescribed by general laws, except that Boards of County Commissioners may provide for the time of exercising the initiative and referendum powers as to local legislation in their respective counties and districts.

The requisite number of petitioners for the invocation of the initiative and referendum in counties and districts shall bear twice, or double, the ratio to the whole number of legal voters in such county or district, as herein provided therefor in the State at large.

Sec. 6. Any measure rejected by the people, through the powers of the initiative and referendum, cannot be again proposed by the initiative within three years thereafter by less than twenty-five per centum of the legal voters.

Sec. 7. The reservation of the powers of the initiative and referendum in this article shall not deprive the Legislature of the right to repeal any law, propose or pass any measure, which may be consistent with the Constitution of the State and the Constitution of the United States.

Sec. 8. Laws shall be provided to prevent corruption in making, procuring, and submitting initiative and referendum petitions.

167. *Educating the Voters in Oregon*

These extracts from the law of Oregon show how that state seeks to enlighten the voters on measures submitted to them under the system of initiative and referendum.

Section 5. When any measure shall be filed with the Secretary of State to be referred to the people of the State, or of any county or district composed of one or more counties, either by the legislative assembly or by the referendum petition, and when any measure shall be proposed by initiative petition, the Secretary of State shall forthwith transmit to the Attorney-General of the State a copy thereof, and within ten days thereafter the Attorney-General shall provide and return to the Secretary of State a ballot title for said measure. The ballot title may be distinct from the legislative

Preparatic of the ball title.

title of the measure, and shall express, in not exceeding one hundred words, the purpose of the measure. The ballot title shall be printed with the numbers of the measure, on the official ballot. In making such ballot title the Attorney-General shall, to the best of his ability, give a true and impartial statement of the purpose of the measure, and in such language that the ballot title shall not be intentionally an argument, or likely to create prejudice, either for or against the measure. . . .

Section 8. Not later than the first Monday of the third month next before any regular general election, nor later than thirty days before any special election, at which any proposed law, part of an act, or amendment to the Constitution is to be submitted to the people, the Secretary of State shall cause to be printed in pamphlet form a true copy of the title and text of each measure to be submitted, with the number and form in which the ballot title thereof will be printed on the official ballot. The person, committee, or duly authorized officers of any organization filing any petition for the initiative, but no other person or organization, shall have the right to file with the Secretary of State for printing and distribution any argument advocating such measure; said argument shall be filed not later than the first Monday of the fourth month before the regular election at which the measure is to be voted upon. Any person, committee, or organization may file with the Secretary of State, for printing and distribution, any arguments they may desire, opposing any measure, not later than the fourth Monday of the fourth month immediately preceding such election.

Arguments advocating or opposing any measures referred to the people by the legislative assembly, or by referendum petition, at a regular general election, shall be governed by the same rules as to time, but may be filed with the Secretary of State by any person, committee, or organization; in the case of measures submitted at a special election, all arguments in support of such measure at least sixty days before such election. But in every case the person or persons offering such arguments for printing and distribution

shall pay to the Secretary of State sufficient money to pay all the expenses for paper and printing to supply one copy with every copy of the measure to be printed by the State; and he shall forthwith notify the persons offering the same of the amount of money necessary.

The Secretary of State shall cause one copy of each of said arguments to be bound in the pamphlet copy of the measures to be submitted as herein provided, and all such measures and arguments to be submitted at one election shall be bound together in a single pamphlet. All the printing shall be done by the State, and the pages of said pamphlet shall be numbered consecutively from one to the end. . . . The title page of every measure bound in said pamphlet shall show its ballot title and ballot numbers. The title page of each argument shall show the measure or measures it favors or opposes and by what persons or organization it is issued. When such arguments are printed, he shall pay the State Printer therefor from the money deposited with him and refund the surplus, if any, to the parties who paid it to him. The cost of printing, binding, and distributing the measures proposed, and of binding and distributing the arguments, shall be paid by the State as a part of the state printing, it being intended that only the cost of paper and printing the arguments shall be paid by the parties presenting the same, and they shall not be charged any higher rate for such work than is paid by the State for similar work and paper.

Distribution of pamphlet

Not later than the fifty-fifth day before the regular general election at which such measures are to be voted upon, the Secretary of State shall transmit by mail, with postage fully prepaid, to every voter in the State whose address he may have, one copy of such pamphlet; *provided*, that if the Secretary shall, at or about the same time, be mailing any other pamphlet to every voter, he may, if practicable, bind the matter herein provided for in the first part of said pamphlet, numbering the pages of the entire pamphlet consecutively from one to the end, or he may enclose the pamphlets under one cover. In the case of a special election he shall mail said pamphlet to every voter not less than twenty days before said election.

168. *A Public Opinion Bill*

A modified form of initiative and referendum is provided by a measure which has long been advocated by many ardent reformers in Massachusetts: —

SECTION 1. On a request signed by one thousand voters, asking for the submission of any question for an expression of opinion and stating the substance thereof, the secretary of the Commonwealth shall transmit such request to the State ballot law commission, who shall determine if such question is one of public policy, and if they so determine, shall draft it in such simple, unequivocal, and adequate form as they may deem best suited to secure a fair expression of opinion. Thereupon the secretary shall prepare and furnish suitable forms, each to contain spaces for not more than one hundred signatures, and if such forms shall be signed by five thousand voters, he shall upon the fulfilment of the requirements of this act place such question on the official ballot to be used at the next State election. Forms shall bear the date on which they are issued, and no applications made on forms issued more than twelve months before the election concerned shall be received.

SEC. 2. Signers of request for the issuance of forms and signers of applications shall append to their signatures their residence, with street and number, if any, and shall be certified as registered voters by the proper registrars of voters. One of the signers to each paper shall make oath of the genuineness of the signatures thereto, and a notary public, justice of the peace, or other magistrate, when taking such oath, shall satisfy himself that the person to whom the oath is administered is the person signing such paper, and shall so state in his attestation of such oath. All provisions of law relating to nomination papers shall apply to such requests and applications as far as may be consistent.

SEC. 3. Applications shall be filed with the secretary sixty days before the election at which the questions are to be submitted. Not more than four questions under this act shall be placed upon the ballot at one election, and they shall be submitted in the order

in which the applications are filed. No question negatived, and no question substantially the same, shall be submitted again in less than three years.

169. *Arguments for the Initiative and Referendum* *

These passages from a catechism prepared by several distinguished advocates of the initiative and referendum sum up the leading arguments in favor of the system:—

Q. What is meant by the Referendum?

Definition of the referendum.

A. The Referendum means the referring of a law or ordinance or any specific question to the people for decision at the polls. A vote on a law or ordinance may be taken, not for the purpose of decision, but merely to secure an accurate and definite expression of public opinion. This is a quasi-Referendum or public-opinion vote, such as is in use in Illinois; also in some cities, such as Chicago and Detroit. The Referendum also means the right of the people to demand the submission of an enactment or measure to the voters for decision; and it is also used to designate a statute or constitutional amendment securing this right.

Q. Is the Referendum un-American?

The referendum is not un-American

A. The Referendum is not un-American unless the principle of majority-rule or rule by the people is un-American. It is majority-rule that is important, and whatever means prove necessary to secure it must be adopted. So far from being un-American, the Referendum is most emphatically American both in principle and practice. From the earliest days of our colonial government in New England the people not only voted directly on specific measures but practically all the laws were made by direct vote of the citizens. This practice has continued in unbroken succession so far as local or town government is concerned, but city and state government has lost its original character. As the growth of numbers made it necessary to rely more and more on representatives, the direct vote of the people was lost, because no one thought of any way in which it could be retained. But now that we have a

plan whereby the direct vote can be taken without an assembly of the people, it is possible to go back to the original American system of actual popular sovereignty. From the standpoint of principle, no government is American unless it is a government by and for the people; and no government can be a government by and for the people where the will of a small body of so-called representatives can override or disregard the will of the people.

Q. Has it made frequent elections necessary, thus greatly increasing the cost?

The cost of government not increased.

A. Instead of making elections more frequent and thus increasing taxation, the experience of the Swiss is the reverse. It is not worth while for politicians to attempt to squander the people's resources or for private interests to bribe them to do so when the people have it in their power upon petition of a small minority, to submit any measure passed by a legislature to a direct vote of the people and veto it if a majority so votes. This removes from the legislators the temptation to corruption. The Governor of South Dakota, a year or two after the constitutional Direct-Legislation amendment went into effect, said: "Since this Referendum law went into effect we have had no charter-mongers or railway speculators, no wild-cat schemes submitted to our legislature. Formerly our time was occupied by speculative schemes of one kind or another, but since the Referendum has been made a part of the constitution these people do not press their schemes, and hence there is no necessity for having recourse to the Referendum."

Q. Does it take from the people's representatives any just rights that belong to them, or in any way limit their legitimate exercise of power?

Representative government not destroyed.

A. The Referendum takes from the people's representatives no power that justly belongs to them. The legislators are the agents and servants of the people, not their masters. No true representative has a right or a desire to do anything his principal does not wish to have done, or to refuse to do anything his principal desires to have done. The Referendum merely prevents the representatives from becoming mis-representatives by doing, through igno-

rance or dereliction, what the people do not want, or neglecting to do what the people do want. A legislative body may depart from the people's will because it does not know what the people's will is, or because the pressure of private or personal interest, contrary to the public interest, overcomes the legislators' allegiance to the people's will. In either case the Referendum is the remedy and the only complete remedy; the only means whereby real government by the people may be made continuous and effective.

Q. Does it destroy "all the safeguards of debate and discussion, of deliberate action, of amendment or compromise"?

A. No. The advantages of the present legislative system, — its compactness, experience, power of work, etc., are retained with the Referendum, but the evils of the present system, — its haste, complexity, corruption and violations of the will of the people, are eliminated. Under the Referendum the city or state has its body of legal experts, trained advisers, and experienced legislators, of course, and they continue to do most of the law-making, but their power to do wrong or stop progress, their power to do as they please in spite of the people is removed. The state that adopts the Referendum has the *service* of its legislators, without being subject to their *mastery*. If the representatives act as the people wish, their action is not disturbed. If they act against the people's wish, the people have a prompt and effective veto by which they can stop a departure from their will before any damage is done. This is a much-needed safeguard of popular institutions. The Referendum raises the legislators to their old position of councillors or advisers to the people and places them above suspicion, because they cannot sell out. It also gives them an independence they do not now have.

Q. Why is it imperatively demanded to-day?

Referendu to control bosses and corporatio

A. The Referendum is imperatively demanded because there has arisen in our midst in recent years a powerful plutocracy composed of the great public-service magnates, the trust chieftains and other princes of privilege who have succeeded in placing in posi-

tions of leadership political bosses that are susceptible to the influence of corrupt wealth. These men direct the political machine whose manipulators are liberally supplied with the ill-gotten wealth furnished by privileged interests for future favors and for protection against legislation that might be enacted in the interests of the people. Through this unholy alliance of corporate wealth with political bosses and money-controlled machines, incorruptible legislators and officials are driven into retirement and their places filled with creatures beholden to corporate wealth and monopoly interests. Against these evils the Referendum is a powerful weapon. It brings the government back to the people, destroying corruption and the mastership of the many by the few.

Q. What is the popular Initiative?

Definition of the initiative.

A. The popular Initiative is the right of a certain percentage of the voters, usually five to ten per cent., to propose a law, ordinance, or constitutional amendment for action by the legislature or decision at the polls or both. Under what is considered by many as the proper form, the measure which is petitioned by the requisite number of voters goes to the proper legislative body which may adopt or reject it, amend it, pass a substitute, or refrain from any action in reference to it. If the legislative body does not enact the measure as petitioned for, or if it takes adverse action in any form, the said measure together with the amendment, substitute or other action of the legislative body goes to the electorate for final decision at the polls.

Q. Would the Initiative result in the demand for a number of unnecessary or foolish laws?

Initiative will not increase legislation.

A. Experience in Switzerland and in our Western States proves that legislation under the Initiative is on the whole wise and conservative. Any one who will take the trouble year after year to read the statutes passed by our legislatures will find it difficult to imagine how any system likely to be adopted in a free country could possibly produce more foolish or vicious laws than the system of law-making by final vote of a few men, largely under the

influence of private and special interests, now in operation in this country. In the long run the judgment of a free people is likely to be superior to the judgment of any small legislative body. When men follow their errors or private interests they diverge. A few men may go together in allegiance to some error or private interest, but when the people as a whole unite it must be by a cancellation of their errors and private interests. In large communities as a rule it is only on the basis of truth and right that the people can get together in controlling numbers. Moreover, the inertia of mankind and the effort and cost necessary to secure the requisite percentage of signatures to the petition render the Initiative essentially conservative. People will not ask for the passage of a law unless they are convinced that it is needed. This has been proved to be the case wherever the Initiative has been employed. But the possession of this right, together with the Referendum, has practically led to the disappearance of corrupt lobbies and other sinister influences that have long offered great temptations to the people's representatives and in many instances have rendered impossible the enactment of needed legislation while forcing to a successful issue laws that were not desired by the people and were inimical to their interests.

Q. What classes favor the Initiative?

A. Those who desire real popular sovereignty; those who desire that the legislators elected by the people shall be representatives, and not misrepresentatives; those who desire to terminate the private monopoly of law-making; those who desire to kill the corporation lobby and abolish boss rule and machine government; those who desire to bring better men into politics, to simplify elections, to lessen the power of partnership, to stop class legislation, to elevate the press and educate the people, to open the door of progress to all wise measures of reform, to establish a reasonable safety valve for discontent and to take the next great step in the improvement of representative government in harmony with the whole trend of modern political history throughout the civilized world and with the fundamental demands of democracy.

The initiative is fundamentally democratic.

170. *Arguments against the Initiative and Referendum* *

The case against the initiative and referendum is thus forcibly stated by Senator Lodge in a speech directed against the Public Opinion Bill printed above: —

The system is revolutionary.

As a matter of fact, no more fundamental and far-reaching measure has been presented to the legislature of Massachusetts within my recollection. It was not a mere change in legal practice nor an alteration of long-established laws, nor even a constitutional change which was proposed. The bill involves all these and much more, for if carried out logically to its full extent, it would mean nothing less than a complete revolution in the fabric of our Government and in the fundamental principles upon which that Government rests. This may seem an extreme statement, but I think it is susceptible of absolute demonstration, because this bill, if it should become law, would undermine and ultimately break down the representative principle in our political and governmental system.

To make my meaning perfectly clear it will be necessary to consider briefly and historically the principles upon which all government rests and the instruments by which it is carried on. Our division of the departments of government into executive, legislative, and judicial, with which we are entirely familiar, and which the Constitution of the United States made coördinate and independent, is not a modern classification, but represents in whole or in part the recognized and essential foundations of all government. . . .

Political liberty and representative government.

Wherever you look into the history of the last four hundred years you will find that the rise and the power of the representative body are coincident with freedom, and that the rise of despotism is coincident with the breakdown of whatever representative bodies there may have been. The history of the representative principle in modern times is the history of political freedom, and this representative principle is the great contribution of the English-speaking people and of the period since the Renaissance to the

science of government. Without that principle the democracy of Greece failed to build up a nation coextensive with the spread of the Greek settlements and conquests while that of Rome sank under a complete despotism. The Empire of the first Napoleon and of the third Napoleon as well were both reared on the ruins of the legislative bodies of France. Examples might be multiplied, but nothing is clearer than that every lasting advance which has been made toward political freedom has been made by and through the representative principle. Even to-day the struggle in Russia seeks, as its only assurance, the establishment of a representative body. Indeed the movement for a larger political freedom and for the right of the people to take part in their own government which has filled Europe for the last century is penetrating now to countries outside the pale of Western civilization, and the existence of this movement in Persia, in Turkey, and in China is manifested by the efforts in all these countries toward securing representative institutions.

The dang of executi despotism

In a word, it may be said that the advance toward political liberty and the establishment of the right of the people to govern have been coincident and gone hand in hand with the progress of the representative principle. It is also to be noted that the independence of the judiciary, the other great bulwark of liberty and of the rights of the individual, has followed everywhere upon the growth and success of the representative principle in government. The destruction of this principle, therefore, would mean reaction and the return to the system of an all-powerful executive. There could be no greater misfortune to free popular government than to weaken or impair the principle of representation, and the quickest way to break that principle down is to deprive the representative bodies of all responsibility and turn them into mere machines of record. You cannot take from your representative bodies all power of action and all responsibility and expect them to survive. If you bind a man's arm to his side and prevent its use and motion the muscles weaken, the arm withers and in time becomes atrophied and useless. If you force the legislature to deal

with certain measures under a mandate which practically compels them to vote upon these measures in only one way you take from your representatives all responsibility and all power of action and the representative principle in your government will atrophy and wither away until it becomes in the body politic, like some of those rudimentary organs in the natural body, quite useless and often a mere source of dangerous disease. This Public Opinion Bill does this very thing, for it aims directly at the destruction of representative responsibility, and I think, although it received the support of many excellent people who did not pause to consider it carefully, that it found its origin among those small groups whose avowed purpose is to destroy our present institutions and forms of government and replace them with socialism or anarchy.

The instruction of representatives *vs.* the mandate.

Every constituency, I repeat, has the right now, as always, to pass instructions to its representative if it can agree upon them, just as it has the right of petition; but that is a very different thing from the final determination by ballot of every possible abstract question by a popular vote. It is worth while to emphasize this difference, for it throws light upon the whole question. The constituency, in the first place, instructs only its own representatives. It does not undertake to instruct the representatives of other constituencies, but only its own, thereby recognizing the representative character of the member or Senator or Congressman whom it has chosen. The instructions, moreover, are passed by a meeting where they can be discussed, amended, and modified, and where the arguments of both majority and minority can be heard. The constituency in passing instructions is not confined to a blind, categorical "yes" or "no" upon a question where neither amendment, discussion, nor modification is possible. They act themselves only with the same safeguards which have been thrown about the passage of laws in the legislature. They are not the helpless instruments of a plebiscite, but freemen setting forth their opinions in the manner which the history of free government has consecrated. Instructions from a constituency are the very antithesis of the "mandate" which it is proposed to extort or

cajole from the people by such a scheme as this Public Opinion Bill.

Wise legislation requires discussion

Intelligent laws can not be passed without consideration, debate, deliberation, and the opportunity for amendment. To answer "yes" or "no" on an abstract question is to legislate by ballot without any of the safeguards which representative government throws around the making of laws. Plebiscites of this sort have determined and fixed the power of autocratic emperors, but they have never made the laws of a free people. This Public Opinion Bill is not even a referendum, for the referendum submits to popular approval a perfected measure, and in the case of purely local questions it is often used by our legislature. What is called the initiative is now covered, for all reasonable purposes, by the right of petition, but this Public Opinion Bill puts both initiative and referendum into one act and provides for the submission to the people not of perfected law but of any abstract question which any thousand people choose to suggest and which any five thousand voters can be found to sign, and upon which the people have no opportunity to do more than vote categorically "yes" or "no." You can not hesitate, you can not modify, you can not amend, you can not postpone. The pistol is at your head; throw up your hands and answer "yes" or "no" at your peril. There are four questions on the ballot. Only one probably has been discussed, and that insufficiently, for perhaps thirty days. No matter; you must answer "yes" or "no" on all four, and the legislature must in reality, whatever theoretical liberty it is supposed to retain, obey the mandate. There is to be no chance for reconsideration, no time for reflection or for second thought. . . .

The voter cannot decide wisely on hearsay evidence.

It is exactly because I trust the people and desire that they should have every advantage that I oppose such revolutionary legislation as this. To compel the people to legislate in a manner practically impossible for any very large body of voters is to do an injustice to the people themselves. It would be like compelling the people to decide by ballot on what they happened to read in the newspapers or hear from their neighbors whether a man was

guilty of murder or not, and then finding fault with them because they reached an erroneous decision. The people would not be to blame for the wrong decision, but those who forced upon them a method of trying a criminal case which in its very nature was utterly impossible in practice. Under this bill the people are to be asked to legislate by saying "yes" or "no" to any question, no matter how abstract or how complicated, which anyone can manage to have placed on the ballot. To deal with such questions by a categorical answer is absurd. It is the easiest thing in the world to frame a question to which a categorical "yes" or "no" is impossible. Take the familiar one, "Have you stopped beating your wife?" Answer it "yes" or "no" and see where it leaves you. Abstract questions can just as easily be framed to which a categorical "yes" or "no" would be utterly misleading, perilous, and unrepresentative. No people, no matter how intelligent, could legislate in such a way as this otherwise than disastrously. There would be no opportunity for modification or amendment, for repeated votes on different stages, or for debate. There would be but little chance for discussion, and good legislation without the opportunity for debate, amendment, and deliberate consideration is an impossibility. Less than one per cent of the voters of the Commonwealth would have under this bill the power to force upon ninety-nine per cent of the voters any kind of question they chose to devise and compel them to say "yes" or "no" to it. Thousands of voters either through indifference or still more through lack of opportunity to understand the question would refrain from voting, and an imperative mandate to the legislature might be carried by a small minority of the voters.

ome
tatistics on
oting.

Let me ask your attention to some figures in order to give you a vivid idea of what I mean and to show how imperfectly "yes" and "no" votes, taken in this way, can be relied upon as reflections of the real will and true opinion of the people. These votes, which follow, were given upon constitutional amendments, the most serious questions which can be submitted, because they involve changes in our organic law and were submitted with all the care

and deliberation which the framers of our constitution could provide.

POPULAR VOTES UPON ARTICLES OF AMENDMENT TO THE CONSTITUTION OF MASSACHUSETTS

DATE	AMENDMENT	VOTE ON AMENDMENT			VOTE FOR GOVERNOR	NOT VOTING
		Yes	No	Total		
Nov. 3, 1891	Abolishing tax qualification for voters for governor, lieutenant-governor, and members of the general court	144,931	53,554	198,485	321,650	123,165
	A majority of each branch of the general court shall constitute a quorum	152,688	29,590	182,278		139,372
Nov. 8, 1892	Abolishing property qualification for office of governor	141,321	68,045	209,366	399,698	190,332
Nov. 7, 1893	Abolishing mileage to members of the general court	125,375	80,855	206,230	365,012	158,782
Nov. 6, 1894	Election of commissioners of insolvency abolished	114,499	34,741	149,240	335,354	186,114
Nov. 3, 1896	Biennial elections — Treasurer's term of office limited to three years	115,505	161,263	276,768	385,064	108,296
	Biennial election of senators and representatives	105,589	156,211	261,800		113,264
Nov. 5, 1907	Authorizing the governor, with the consent of the council, to remove justices of the peace and notaries public	178,095	35,989	213,994	373,695	159,701

How minority rule is established.

These figures show the absolute truth of my assertion that questions submitted in this way are decided by a majority of a minority, and if this is true of constitutional amendments, fully and plainly stated, you can imagine what it would be on abstract questions, unknown, blind, uncomprehended, and incomprehensible. These figures show beyond a peradventure that no true public opinion can be obtained in this way, but that on the contrary this bill is a scheme to secure legislation which could not obtain the assent of the voters properly expressed through chosen and responsible representatives. It is a device to enable small and active minorities to obtain legislation which they could not secure by legitimate methods. Representatives represent the whole people. This bill would force upon us a government by a fraction of the

people and would defeat the will of the real majority of the people themselves.

Yet the legislature would have no choice. They would be bound in conscience and in practice, if not by the words of the statute, bound in a manner and forced by a pressure from which there would be no escape, to obey the mandate no matter how obtained, and no man could tell in what form of law the mandate would be finally embodied. The chances are that the law under the pressure of the mandate would be the work of extremists and contrary to the wishes even of those who voted "yes" on the abstract proposition. There could be no greater travesty on popular government than a system which would permit a majority of a minority of the voters to force upon the state any law they chose. It would give an enormous opportunity to the power of money skilfully and corruptly used. It would impair the rights of the people and leave those of the individual naked and defenseless. The result would not be an expression of the popular will, but a mechanical parody of that will so gross that even its authors would gaze upon it with amazement and disgust. . . .

Experience has shown us the justice of their opinions. This bill invites us to cast aside all that they did, break down every method of lawmaking which they established, and reject that principle which they most valued, the principle of representation. I say, reject the principle of representation, because when you impair it and take from your representatives all power and all responsibility, the principle of representation falls. No men invested with the power to make laws, but relieved of all responsibility for the laws they make, are to be trusted. We may change many things, we may abolish laws and put new ones in their place, but we can not alter the fundamental principles of our government and expect the fabric to stand. If we undermine and overthrow the bulwarks of ordered liberty and individual freedom, the citadel itself will not long survive. Any measure which breaks down free representative government, advances us proportionately on the road to executive government, to the rule of one man. This

Public Opinion Bill will reduce the representative on one question after another to the level of a machine. As the representative principle sinks, the executive power rises. I believe in maintaining both and maiming neither. I am opposed to crippling and extinguishing representative government. I love freedom and hate tyranny, and anything which depresses the one and opens the road to the other will meet with resistance from me. It is for this reason that I oppose this bill.

CHAPTER XXIV

THE STATE EXECUTIVE DEPARTMENT

171. *The Legal Position of the Governor*

THE place of the governor in the state administrative system and his relations to the other officers in the executive department are described by Chief Justice Wilson, of Illinois, in a noteworthy decision dealing with the governor's power to remove the secretary of state: —

'he governor's ower found ı the Conitution of ıe state.

The case then resolves itself into the single question, Does the Governor possess the constitutional power of removing from office the Secretary of State, and appointing a successor, at will? In deciding this question, recurrence must be had to the Constitution. That furnishes the only rule by which the court can be governed. That is the charter of the Governor's authority. All the powers delegated to him by, or in accordance with that instrument, he is entitled to exercise, and no others. The Constitution is a limitation upon the powers of the legislative department of the government; but it is to be regarded as a grant of powers to the other departments. Neither the executive nor the judiciary, therefore, can exercise any authority or power, except such as is clearly granted by the Constitution.

As the right of the Governor to remove the Secretary must be granted by the Constitution, or it does not exist, it therefore devolves upon those who advocate the claim of the executive power to show the grant upon which it is founded; to point out the clause and section of the Constitution from which it is derived. How has this been done? Has any express grant been produced? No; it is not pretended that any express grant is to be found in the Constitution. But it is contended that the power in question is granted to the Governor by implication. That from the grant of

other powers, this one of removing the Secretary from office is necessarily implied, as the means of rendering those grants available; and the following clauses of the Constitution are relied on in support of this position. . . .

Interpretation of the general executive power.

The next grant of power relied on is, that "The executive power of the State shall be vested in a Governor." This clause is treated by the court below as conferring numerous and ample powers upon the Governor. All that are usually denominated executive powers, by theoretical writers, are supposed to be included in this grant to the Governor, except such as are expressly conferred upon other departments. This, I think, I shall be able to show is a mistaken view of the subject. This clause, like the preceding ones, is a declaration of a general rule; and the same remarks are applicable to this, as a grant of power, that have been made in reference to them. It confers no specific power. What would have been its operation, if the Constitution had contained no specific enumeration of executive powers, is a very different question from that now presented, and might have admitted of a different answer. But it has been settled by the Supreme Court of the United States that an enumeration of the powers operates as a limitation and restriction of a general grant.

The powe to require informatic

The authority of the Governor to require information from the officers in the executive department, relative to the business of their respective offices, and the obligation of the Secretary to keep a register of his official acts, are relied upon, in connection with the injunction that the Governor shall see that the laws are faithfully executed, as implying an authority in him to dismiss the Secretary. If the right to require information from an officer implied the right to remove him, the Legislature would have the power not only to remove the Governor, but a power, concurrent with him, to remove all the officers in the executive department; for the Legislature has, under its general powers, authority to call on all of them for official information.

But it is argued from the Secretary's obligation to register the official acts of the Governor, and, when required, to give him

he relation the governor and her high ıte officials.

official information, that such an official intercourse of confidence must exist as to imply an authority in the Governor to remove the Secretary. The President may require the opinion of the heads of departments, their views, counsel, and advice, relative to the legality or policy of measures. In the exercise of this right he calls on one or more, according to the difficulty or importance of the subject; but whether the consultation is separate, or in cabinet council, it is always private and confidential, and is so regarded, not only by the officers but by the law also; for none of the officers or their clerks (who are sworn to secrecy) can be required to give testimony of transactions, or matters of a confidential character. But neither in contemplation of law, nor in fact, is there any official confidential intercourse between the Governor and the Secretary, or other officers of the executive departments. He may call upon them for information relative to matters connected with their offices. He may, for example, enquire of the Treasurer, of the Auditor, what amount of warrants are outstanding, and of the Secretary, what are the kind and number of commissions to which he has put the State seal; or whether the laws are all distributed, etc. These are all public matters, in reference to which there can be neither secrecy nor confidence and it is only in relation to such that the Governor can require information. He has no right to the opinion or advice of the Secretary, as to the legality or propriety of measures of any kind; and as all the duties of the Secretary are prescribed by law, and as it is only in relation to them that he can be required to give information, there cannot, therefore, in the nature of things, be any implication of confidence from communications relative to a public law or to matters of fact recorded for public information.

ıe secre-y an independent icer.

The reasoning in favor of the Governor's authority to remove the Secretary, because of the latter's duty to register his official acts, can have no application to the Secretary of State, an officer whose office is created, and whose duty to keep a register of the acts of the Governor is prescribed by the Constitution. In the performance of this, as of other duties, he does not act as the Governor's

officer, subject to his control and direction, but as the officer of the Constitution, bound to the performance of such duties only as have been assigned by that instrument and the law.

The duty of seeing to the execution of the laws.

The injunction, that the Governor shall see that the laws are faithfully executed, it is also urged, gives him the control, and consequently the power of removal of the officers of the executive department. This interference is not justified by the premises. It has neither the sanction of authority nor the practice of other State executives, both of which are opposed to it. The practice of the President, as I will show, is founded upon other grounds, and his power does not extend to the removal of any officers whose offices are created by the Constitution, and whose duties are regulated by law. The manifest intention of the Constitution, and the authority cited, in the absence of all precedent and principle militating against it, would seem to be conclusive against the executive claim of power, under this provision, to direct the Secretary how he shall execute the duties assigned him by law; and if he has no power to direct him how he shall execute his duties, he certainly has no power to dismiss him for not conforming to his directions. . . .

State and federal executives compared

The Constitution of the United States and of this State contain the same declarations that the executive powers of the Government shall be vested in the respective executives; and in the Constitution of the first, this declaration is carried out by its other provisions. It creates no other officers in whom a portion of this power is vested or required to be vested by law. Those officers whom the President may remove are created by law, as aids and helps to him in the performance of his duties. But the declaration in our Constitution, that the executive power of the government shall be vested in the Governor, is to be understood in a much more limited sense; inasmuch as, by its other provisions, it is greatly circumscribed and narrowed down. Unlike the Constitution of the United States, ours has created other executive officers, in whom a portion of this power is required to be vested by law, not to be assigned by the Governor. . . .

ıe gov-
ıor not re-
ɔnsible for
: work of
: secre-
y.

The Governor is, neither in fact nor in theory, personally nor politically responsible for the official conduct of the Secretary, or any other officer. He cannot assign him the performance of a single duty or control him in the performance of those assigned by law. He does not move in the executive circle, as has been said, but in that marked out by the Constitution and by the law, separate, distinct from, and independent of, that of the Governor. He looks to the law for his authorities and duties, and not to the Governor; and to that, and to that alone, he is responsible for their performance.

172. *The Question of Centralization in Administration*

In his inaugural address of 1909, Governor Hughes, of New York, explained how the governor, charged with the faithful execution of the laws, was handicapped by the division of responsibility in the administration and by the decentralization of authority.

ıe limited
ɔpe of the
ɾernor's
:cutive
ɯer.

While the Governor represents the highest executive power in the State, there is frequently observed a popular misapprehension as to its scope. There is a wide domain of executive or administrative action over which he has no control, or slight control. There are several elected State officers, not accountable to the Governor, who exercise within their prescribed spheres most important executive powers. To the Comptroller and State Treasurer are confided administrative powers with respect to financial matters. The Attorney-General is charged with duties appropriate to the enforcement of public rights through legal machinery. The State Engineer and Surveyor has important powers with regard to the canal improvement and the only member of the Canal Board accountable to the Governor is the Superintendent of Public Works who has a limited authority. The Commissioners of the Land Office are independent of the Governor.

ıltiplica-
n of exec-
ve duties.

The multiplication of executive duties incident to the vast and necessary increase in State activities has resulted in the creation of a large number of departments exercising administrative powers

of first consequence to the people. The Governor has the power of appointment, but in most cases the concurrence of the Senate is necessary. The terms of these officers are generally longer than the Governor's term. And in their creation the Legislature with few exceptions has reserved final administrative control to the Senate in making the heads of departments, to whose appointment the Senate's consent is necessary, removable only by it.

Division responsi gives no sponsibi

Our system is therefore widely different from that of the Federal government. The President, through his Cabinet, has direct control of the great executive departments, and administrative officers though appointed with the concurrence of the Senate are responsible to the President and are removable by him. Yet it can hardly be said that there is more reason to fear centralization in the State than in the Nation. The practice of withdrawing appointive administrative officers from direct responsibility to the executive head of the State, who is directly accountable to the people, is of doubtful wisdom. A division of accountability which practically results in no real accountability to any one lessens the proper stimulus to efficiency.

Centrali tion doe endange liberty.

Responsibility to the people is the essential safeguard of free institutions. This does not mean the election of all or even of a great number of administrative officers, for undue burdens upon the electoral machinery would defeat its purpose. But it would seem to imply that distribution of administrative powers should have as its correlative the proper centralization of responsibility. It may fairly be said to require that the executive authority, exercising the appointing power under whatever check, should be responsible for administration and should have the control upon which such responsibility must rest.

The gov ernor an local offi

The Governor is to "take care that the laws are faithfully executed." But with respect to this duty there are further limitations than those involved in his relation to appointive officers. It is part of our system of government that the laws in large measure are enforced through officers locally chosen. To the Governor in certain cases is given the right to remove local officers, but this

is only upon charges properly made and sustained after hearing. While the Governor's exercise of this jurisdiction is not subject to review, he in his province, like the highest court of the State in its province, must not act capriciously or arbitrarily, but in accordance with the rules and principles governing his authority. The Governor is as much bound to support our constitutional system of local government so far as it provides for the local choice of officers, as he is to remove officers clearly proved to be guilty of serious neglect or misconduct. The Governor has no right to use his power of removal to assert his preferences or to attempt even temporarily to impose his will upon the community which has chosen its officer. The appeal to him is the necessary check to secure responsible government and must be justified by proof of such dereliction as may be sufficient to make removal of the elected officer consistent with our fundamental principles of local self-government.

173. *The Method of Selecting State Officers* *

Although recent tendencies in state constitutional development would seem to indicate that the American people had settled upon popular choice as the best method of selecting the more important state officials, the question cannot be said to have been decided satisfactorily. Popular election and appointment by the governor were discussed at length in the Kentucky constitutional convention of 1890.

ıe way in
ıich state
ıcers are
:cted.

MR. MCHENRY. I do not believe, after the experience we have had in Kentucky in regard to our late Treasurer, that the people care to elect a Treasurer again. I think the money is safer in the hands of an appointee of the Governor. The people of Kentucky elect a man; they never see him. Tate [a defaulting treasurer] lived in Frankfort here, and they never saw him in my county where we have five thousand voters. We voted for him nine consecutive times. The people took him upon trust, because he was nominated by the political party to which a majority of the people belonged. They believed him to be honest and elected

him because he was the nominee of their party; and yet the result was that he was a defaulter finally, and was a rascal, I presume, from the time he was first elected. I mean to say we are really not qualified to select a man for Treasurer of the State. The majority of the people do not know and cannot know of the qualifications of the man who is running for office. In my county there were not fifty men who knew Tate. He never put his foot in the county, and there were not fifty men in the county who had ever seen him. The remedy I propose is that we make the Governor of the State morally responsible for the money. I do not mean to make him legally responsible, but only morally. We have never made a mistake in electing a Governor of Kentucky. We have always elected men of high character and integrity, and if such a man is to be held morally responsible for the finances, he will see to it that the treasury is honestly managed. By this we give the Governor such power that he can turn this Treasurer out whenever he sees proper to do so. My amendment goes to that extent that he shall hold his office simply during the pleasure of the Governor, and if the Governor finds out, not absolutely or certainly, or to such an extent as would authorize an impeachment, but if the Governor understands that the Treasurer of the State is dealing in margins, or buying stocks or bonds, or investing in booms, then I take it for granted that the Governor, whose integrity and high character are involved, would change the State Treasurer.

I do not mean to say that the people elect dishonest men, but we are more apt to put a rascal in the Treasury Department, where he goes through a political convention log-rolling votes from one end of the State when he lives in another. Then, when by his shrewdness and astuteness he carries the convention, he is elected by the people. He will be elected, however dishonest he is, for the people do not know it. We have this sad experience in Kentucky and in other states, and I do say that if the gentlemen had debated this before their constituents when they were candidates for the position they now hold, I think they would have found that a majority of the people of Kentucky are in favor of the position

The vo
do not
scrutini
the mir
state of

I assume, or something similar to it. The people want their money safe, and if anybody can suggest any better way than I have done, I will be perfectly willing to have that put in place of my amendment. This puts behind the Treasurer the high character of the Governor. We always elect good Governors. The political parties do not look at the character of the minor officers as they do at the character of the Governor. They do look at the integrity and high character of the Governor, and no man who has not a reputation from one end of the State to another can ever be nominated by any political party for Governor of the State. When we put our money under the surveillance of the Governor, he can say, "I have suspicion that this man is dealing in margins, or buying stocks or bonds, and the State is taking the risk of whether he wins or loses in his gambling, and I will turn him out. I do not want my character to go down with his." . . .

n argu-
ent for
ective
ficers.

MR. HANKS. I believe the voters of this Commonwealth are competent to elect their Treasurer. I know full well that they are able to elect a Governor, and, by the way, as was said yesterday, we have universally elected a good one without one exception. If the people of Kentucky are capable of electing a good Governor, I think they are capable of electing a good Treasurer. As I have said, I was sincere in believing that the Delegate from Ohio was jesting about it. I cannot imagine his object, if he was sincere. I do not believe that the people of Kentucky will go back to the appointive system. They will not do it. They cannot do it. They ought not to do it. They ought to keep the power to elect all the officers of the Commonwealth in their own hands, and grasp it tight. Keep the right and power to elect and control by legislative enactments the actions of all the officers of the Commonwealth. We should adhere to that with great tenacity, because power will grow. The strength of men in power increases. Hold them as it were in the hollow of your hand, so that they can be controlled by the people of the Commonwealth, to whom the Government belongs.

MR. COX. When the right of the great masses of the people

is endangered, let us seek a remedy, and that remedy is found in the exercise of the elective franchise in conformity with statutory or organic law. I say here, taking the history of Kentucky as the evidence upon which we should base our judgment, sitting as a jury to decide this great case under the evidence given in the history of our State, we must unquestionably say that the appointing power has proved a failure, and that we must maintain our rights by securing to the people that sovereignty, that right, that power to which they are justly entitled. Now, I find a strong feeling in this Convention to give to the Governor of this Commonwealth vast and almost unlimited power, to make him a sort of autocrat here for four years. Some delegates are urging that he must appoint Judges of the Courts, that he should appoint all the State officers at this Capital. If that is right, why not take another step down? Let him appoint our County Court Judges, let him appoint our County Court and Circuit Court Clerks, let him appoint our magistrates; yes, let him become the mighty ruler in this great Commonwealth, clothed with that power which alone belongs to the people, and which every lover of liberty in America should cherish. Yes, give him one power, and soon he will step forward and ask for an increase of that power. I love our form of Government. I love it for its glory, its beauty and its grandeur. I love it for what it has accomplished; but while I love it, I loathe in the deepest recess of my heart any effort whatever that will go in the direction of taking from the people of Kentucky the right to choose their officers. I hold the taking of such a right from them is an innovation of the right which every man in this broad land should cherish. Let us, gentlemen of this Convention, maintain our rights. Let us stand up boldly and let no man rob us of a single right.

The dange in increasi the govern or's power

MR. BULLITT. This is simply a business question. I think all this gush about the rights of the people to control the matter has but little to do with it. It is a simple matter of business how we shall guard the money that has been gathered for the administration of the government of the State. The Committee thought that the

Administra tion a matt of business

best way to guard our money was to make the treasurer ineligible to succeed himself. According to the information I get from the newspapers, the Treasurers of the States of Mississippi, Maryland and some other states, as well as the treasurer of the State of Kentucky, had adopted the habit of using the State money for the purpose of securing their succeeding election. Now, all must admit that this is an evil. . . . Master Commissioners have made use of moneys to secure the election of the judge who would appoint them, and the treasurer might use the same method to secure the election of a Governor. Therefore, the safest and best business plan was to make him ineligible for a second election, or to succeed himself; and by making him ineligible to succeed himself we withdraw from him every inducement to make use of the State money to re-elect himself.

174. *The Growth of Executive Influence* *

Mr. Gamaliel Bradford, an eminent publicist and careful observer of American institutions, thus describes what he regards as one of the marked tendencies of American political evolution in recent years: —

Powers of the executive in relation to legislation.

Even contemporaries are able to note the beginnings of silent innovation. Of all of its bearings, they may be but dimly aware, yet they can see that a real change is slowly taking place. One such lies upon the surface of English politics to-day, and is clearly discernible in our own. We mean the greatly heightened powers of the executive government, in what relates to legislation. In England, the initiative of private members of Parliament has almost entirely disappeared. All the important bills are now government measures, and the government is claiming and getting more and more of the time of the House of Commons. This is a profound change, and represents an entire dislocation of the literary theory of the British Constitution, a hundred and twenty years ago.

But a similar alteration of inherited practice is rapidly invading this country also. The Executive as Legislator is now a familiar

figure among us. President Roosevelt is not the only exemplar. Governor after Governor has been making of himself the chief fountain of legislation in his State. There is no more suggestive sign of the times. East as well as West, the phenomenon presents itself. Governor La Follette in Wisconsin has been imitated by Governor Johnson of Minnesota and Governor Hoch of Kansas. To the initiative of Governor Hughes of New York comes an immediate response from Governor Woodruff of Connecticut and Governor Fort of New Jersey. All of them press critical matters upon their Legislatures. All of them tacitly assume that the Governor must intervene with prompting and public advocacy of important legislation, or else it will fail. Nor is this attitude much resented by Legislature or Congress. As for the people, they accept it enthusiastically.

Executives who assum legislative functions.

Yet how deep a breach with the old ideas and historic practice all this represents, every one must see who stops to think. The jealous isolation of the Executive, in all that relates to law-making (except assent to new statutes) is one of the most vital traditions of Anglo-Saxon constitutional law. Contrast this with the constant appeal, nowadays, to the wishes of President or Governor; with the direct activity of Executives not only in recommending legislation but in sending for members of Congress or of the Legislature to urge them to vote for particular measures; and we begin to understand how long is the road we have travelled.

A breach with old practices.

How does all this fit into the democratic theory? What does it signify in regard to representative institutions? It would be rash to attempt a full and satisfying answer to these questions. We are too near the political development, too much a part of it, to detach ourselves and pass judgment upon it conclusively. Partial answers, however, we may find in the very facts under discussion. It is clear, to begin with, that Congressmen and members of the Legislature are becoming more strictly *local* representatives. They cannot see beyond their districts. Few of them are nationally-minded or State-minded. In large affairs, affecting all the people, they have lost their initiative, because

The signifi cance of th movement.

their time and strength are taken up with the petty interests of their immediate constituents. For them, they run errands, seek offices, work for local appropriations.

The executive represents wider interests.

Somebody else has to take the broad view, to look after the nation or the State, while they are absorbed with Buncombe County or Podunk. And this somebody is getting to be more and more the directly elect of all the people. To a President, or Governor, thus chosen, all the people are coming to look increasingly, not merely for administration, but for impulse and driving power in legislation. They may be no wiser than the nominal legislators, but they have a wider outlook, and they feel mightier impulses from the whole citizenship pushing them on. Hence, it is no trouble for democracy to adjust itself to the new practice. Choosing the executive directly, it chooses him now to be the chief medium of progressive and reformatory law-making. If it gets its will done, it cares little about the instrument. If American Congresses and Legislatures are leaving off fighting the Executive, it is because the Executive has come best to represent the whole people.

175. *The Veto Power*

During the debate in the Kentucky constitutional convention of 1890, over the question as to whether a two-thirds vote should be required in the legislature to pass a bill over the governor's veto, the question of the veto power in all of its bearings was discussed.

The question of the vote for repassage.

MR. CARROLL. Why should we not insert a provision that it shall require two-thirds of the General Assembly to pass a bill over the Governor's veto? Can any good reason be assigned against it? The Governor's veto is not absolute. The power vested in the Executive is simply a qualified one, and the main object of it is to direct the attention of the Legislature to any matter that may have escaped their attention, in order that they may have an opportunity to correct it; and if two-thirds of the members of any General Assembly cannot be found who are willing upon

a reconsideration to pass a bill over the Governor's veto, I insist that that bill must be in itself of questionable propriety, because any laudable measure, any measure beneficial to the best interests of the people of the State, could certainly obtain the vote of two-thirds of the members elected to each branch of the General Assembly.

Distrust of the legislature.

On the other hand, the Legislature, acting as they often do, hastily and unwisely; passing bills as they often do, without any consideration whatever, can, under the present law and under the report of the Committee as adopted, repass them over the Governor's veto without any difficulty whatever, if they see proper to do so. It is a well-known fact that one of the prime causes for the calling of this Convention was the abuses practiced by the Legislative Department of this State; and I venture the assertion that except for the vicious legislation and the local and special laws of all kinds and character passed by the Legislatures that have met in Kentucky for the past twenty years, that no proposition to call a Constitutional Convention could ever have received a majority of the votes of the people of Kentucky. The people of Kentucky are more in danger from abuses by the Legislative Department than they are from abuses of any other Department of the State Government.

The governor as a conservati force.

Mr. Mackoy. Government is a system of checks and balances, and that government it seems to me is the best in which the powers of government are so arranged as that neither may infringe upon the other, and that one or all combined may not affect the people. We know that the representatives, or the members of the General Assembly, represent more perfectly the will of the whole; that sometimes they come from the people in times of great political excitement, when the entire State may be moved by political questions that are of burning importance. It is upon these occasions that a majority of the Legislature might interfere with and trample upon the rights of the minority, and it is then that the Governor, whose term of office is longer than that branch of the Legislature which reflects most perfectly the will of the people, would

be most likely to stand impartial. The possession of power makes one conservative. The instances are numerous in which men comparatively of no character have been placed in important positions, men who were radical in their opinions, and the moment they have accepted a position of responsibility and power, they have become conservative in their actions. The Governor of Kentucky is the representative of the entire State. He represents every party in the State. He represents not singly the Democratic party or the Republican party, or any other party; but he stands there as the representative of all; and if in a time of public heat and party passion persons composing the General Assembly should be tempted to do something which they would not in calmer moments, it seems to me that the Governor, more than any one else, would be likely to repress the inclination to do wrong by the proper exercise of his veto power.

An argument for repassage by majority vote.

MR. BECKNER. If the gentleman's amendment prevails, the Governor may say that no bill shall be passed until two-thirds of the members of both Houses elected shall have voted for it, which would be a destruction of the majority rule, and would be the most serious innovation upon our system of Government that could be made. The veto power is given simply for the purpose of calling the attention of the Legislature to inadvertences; to mistakes or to errors it may commit through want of proper consideration, and not to give the Governor more power than the General Assembly has, or, in other words, the people, through their representatives, have. It is conferred in order that someone who has a cool head, who reads carefully what they do, may calmly consider and call their attention to an error in the bill they may have passed; and the representatives of the people have almost always responded by refusing to pass a bill where a mistake had been made. If the Governor, however, should be mistaken in his view, there are one hundred and thirty-eight representatives of the people who sit in this hall, and in the hall across the way, who will correct this mistake, and pass the bill, as they ought to have the right to do; and I cannot imagine any greater mistake

that we could make than to say that the people shall not rule through a majority of their representatives.

This passage from a veto message of Governor Black of New York illustrates the exercise of the important power of vetoing items in the general appropriation bill: —

Eleventh — "For the faculty of the medical department of the university of Buffalo, for the equipment and maintenance of a laboratory to be devoted to an investigation into the causes, nature, mortality, rate and treatment of cancer; and the salaries of officials of the same, ten thousand dollars; same to be paid upon vouchers officially signed by the director of said laboratory, or, in his absence, by the secretary and treasurer of the faculty."

Ap tion can vest

I cannot approve a proposed policy which requires the State to engage in the investigation of the causes of various diseases with which the human family is afflicted. I think that the interest of the people themselves and the skill, intelligence and enterprise of the physicians may be depended upon to make such investigation.

176. *The Call of an Extraordinary Session*

The following document shows how the governor of New York may call an extra session of the legislature and urge upon it the consideration of some special questions: —

State of New York, Executive Chamber.
ALBANY, May 22, 1899.

TO THE LEGISLATURE:

I have called you together in Extraordinary Session for the purpose of considering the subject of the taxation of franchises.

My message to the Legislature of March 27, 1899, ran in part as follows:

Me the ture sess

"At present the farmers, the market gardeners and the mechanics and tradesmen having small holdings, are paying an improper and excessive portion of the general taxes, while at the same time many of the efforts to remedy this state of affairs, notably in the direction of taxing securities, are not only unwise, but inefficient, and often serve merely to put a premium upon dishonesty. . . .

"It yet remains true that a corporation which derives its powers from the State, should pay to the State a just percentage of its earnings as a return for the privileges it enjoys. This should be especially true for the franchises bestowed upon gas companies, street railroads and the like. The question of the municipal ownership of these franchises cannot be raised with propriety until the governments of all municipalities show greater wisdom and virtue than has been recently shown, for instance, in New York City; and the question of laying and assessing the tax for franchises of every kind throughout the State should in my opinion be determined by the State itself. I need not point out to you that in foreign communities a very large percentage of the taxes comes from corporations which use the public domain for pipes, tracks and the like." . . .

Recommendations to the legislature.

Accordingly I recommend the enactment of a law which shall tax all these franchises as realty, which shall provide for the assessment of the tax by the Board of State Tax Commissioners and which shall further provide that from the tax thus levied for the benefit of each locality there shall be deducted the tax now paid by the corporation in question to the locality. Furthermore, as the time for assessing the largest and wealthiest corporations, those of New York and Buffalo, has passed for this year, and as it will be preferable not to have the small country corporations taxed before the larger corporations of the cities are taxed, I suggest that the operation of the law be deferred until October first, of this year. THEODORE ROOSEVELT.

177. *An Exercise of the Pardoning Power*

The way in which a governor may use his pardoning power to mitigate the rigors of the law is illustrated by the following paper issued by Mr. Roosevelt as governor of New York in 1900.

Statement of the reasons for pardon.

July 27, 1900. Edward Wise. Sentenced March 31, 1899, to be executed; county, New York; crime, murder, first degree; prison, Sing Sing. Commuted to imprisonment for life. Wise was convicted of murder in the first degree for causing the death of

Charles F. Beasley while attempting to rob him on one of the public streets of the city of New York. The evidence given upon the trial together with additional evidence adduced upon the application for clemency shows that the crime was committed by Wise in company with a confederate named Sweeney. There was no thought of killing Beasley or of doing him bodily harm, but, while they were engaged in the attempt to rob him, Sweeney struck him a blow which felled him to the ground, and his head coming violently against the pavement his skull was fractured, resulting in his death. Wise was taken into custody at once, but Sweeney escaped. Legally Wise was no doubt as fully responsible for Sweeney's act in striking Beasley and for the consequences of it as if he had himself delivered the blow, although in fact he in no way consented to it, and had not contemplated anything of the kind. And although the killing of Beasley was altogether unintentional and occurring as it did quite in the nature of an accident, still those by whose act it was brought about were, under the statute, guilty of murder in the first degree, being at the time engaged in the commission of a felony. But in view of all the circumstances, death, the only penalty prescribed by law for the offense, seems too stern and severe, and some mitigation is due by way of executive clemency. Imprisonment for life will be fully commensurate with Wise's guilt and sufficient for all the demands of justice.

178. *Martial Law*

Whenever the governor of a state, in the exercise of the power bestowed upon him by the constitution, establishes martial law, he usually issues a proclamation in the following tenor: —

December 4, 1903.

Reasons for declaring martial law

Whereas, said destruction of property with attendant loss of life by mob violence, as above set forth, is but a repetition of outrages covering a long period of time just past in said county, during which time citizens have lost their lives without the offenders being apprehended or punished therefor; and

Whereas the civil authorities have shown themselves either unable to deal with these criminals and bring them to punishment or else are unwilling to perform their duty, by reason of threats and intimidations, or through fear or subserviency to such body of lawless and armed men, so that a state of lawlessness exists in said county of Teller, the laws are set at defiance, and the citizens are unable to enjoy the rights guaranteed them by the constitution and laws of this State, and by reason of these conditions it appears that life and property are unsafe in said county; and

Whereas, I have reason to believe that similar outrages may occur at any time, and believing the civil authorities of said county of Teller are utterly unable, unwilling and are making no practical attempt to preserve order and to protect life and property:

Now, therefore, I, James H. Peabody, governor of the State of Colorado, by virtue of the authority in me vested, do hereby proclaim and declare the said county of Teller, in the State of Colorado, to be in a state of insurrection and rebellion.

The implications of martial law are thus indicated by the instructions furnished to the troops by General Sherman Bell acting under the above proclamation: —

Civil and criminal law subject to military necessity.

The county of Teller, in consequence of the occupation by the militia, is subject to the supreme military authority and control when necessity requires and occasion demands, and it becomes necessary to suspend, in part or in its entirety, by the occupying military authority, the criminal and civil law and the domestic administration and government in the occupied place or territory, and to substitute military rule and force for the same, as well as in the dictation of general laws, as far as military necessity requires this suspension, substitution or dictation. The militia may proclaim that the administration of all civil and penal law shall continue either wholly or in part as in times of peace, unless otherwise ordered by the military authorities.

Martial law extends to property and persons.

As martial law is executed by military force it is incumbent upon those who administer it to be strictly guided by the principles of

justice, honor, and humanity — virtues adorning a soldier even more than other men. To preserve law and order is paramount to all other considerations. All civil and penal law shall continue to take its usual course, unless interrupted or entirely stopped by order of the occupying military power. Martial law extends to both property and persons. Whenever possible martial law is carried out in cases of individual offenders by military court, under military jurisdiction, which is twofold.

Limits of military necessity.

Military offenses must be tried under and punished in accordance with the rules and articles of war governing the armies of the United States, and incidentally the National Guard of the United States and Territories and the District of Columbia, under the Dick bill. Military necessity admits of all direct destruction of life and limb of armed enemies, and other persons whose destruction is incidentally unavoidable. Military necessity does not admit of cruelty. It does not admit of the use of poison in any way. It admits of deception, but disclaims acts of perfidy. It is not carried on by arms alone. . . .

Citizens subject to military duty.

Every able-bodied male citizen of Colorado, and those who have declared their intention to become citizens of the United States, residing therein, between the ages of 18 and 45 years, except persons exempt by law, are subject to military duty and are likewise subject to military enrollment and to pay military poll tax. The adjutant-general is empowered with the enforcement and collection of this tax of $1 from each person, and the failure or refusal to pay same is punishable by both fine and otherwise.

The law must be obeyed.

Every law-abiding citizen in the county of Teller and State of Colorado, if he, she, or they are engaged in any legitimate business, no matter what their vocation in life, regardless of their union or nonunion affiliation and creed, shall first obey the laws of the land, those of Colorado and the United States of America included; and no one shall be interfered with nor in any wise molested at any time during the day or night, under penalty of military law, rule, discipline and protection. . . .

SHERMAN M. BELL.

179. *Legal Advice to the Governor*

It is the duty of a governor to veto a measure which he believes to be palpably unconstitutional, and he may secure expert advice on any bill by submitting it to the attorney-general. This report from the attorney-general of Iowa to the governor illustrates the practice: —

SIR — Complying with your request, I herewith submit a brief as to the constitutionality of House file No. 78 relating to the place where action can be commenced upon promissory notes made to insurance companies.

At the outset of this question two fundamental propositions are presented:

Corporations entitled to equal protection of the law.

First — That corporations are persons within the provisions of the fourteenth amendment of the Constitution of the United States, and that the rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities, any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A state has no more power to deny corporations equal protection of the law than it has to deny such protection to individual citizens. . . .

An unreasonable classification.

Second — All classification for legislative purposes must have some reasonable basis upon which to stand. It must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without such basis. . . . No valid reason can be given why a promissory note, executed and delivered in consideration of a contract of insurance, should not stand upon the same footing, so far as the right of the holder to transfer the same is concerned, as a note given for any commodity or for any other valid consideration. The act of the legislature attempts to create a distinction and classification between one class of corporations and other persons within the state which does not exist naturally or furnish a reasonable basis for separate laws and regu-

lations. The classification is unnatural and arbitrary, as there exists no substantial distinction between promissory obligations and other property held by an insurance company, and obligations and property held by other corporations within the state.

The act in question is invalid.

For the reason that the act thus arbitrarily attempts a classification of corporations as to property owned and held by them which does not naturally exist, and is not framed so as to extend to and embrace equally all persons who are or may be in the like situation, and abridges the right of such corporations to sell and transfer property legally held by them under the law of the state, the act is, in my opinion, invalid under the fourteenth amendment of the Constitution of the United States and section 1 of article 1 of the constitution of the state of Iowa.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

May 7, 1902,
To the Honorable A. B. CUMMINS,
Governor of Iowa.

180. *Government by Commission*

One of the striking features of recent developments in state administration is the increase in the number of commissions charged with various functions relating to the execution of the law. This tendency was deprecated by Mr. Dean in the New York constitutional convention of 1894:—

Commissions contrary to American institutions

MR. DEAN. The question has been asked is it advisable to abolish the commissions; are they not necessary to the scheme of government? There are, I believe, fifteen commissions in this State, including the State Board of Pharmacy, and of this number eleven have been created since 1880. Prior to that time, with the exception of those created from among the State officers, a commission was almost unknown in this State, and a permanent commission, involving expenditures to the state, was almost without precedent. That they are contrary to the spirit of our institutions,

I believe, will, on reflection, be conceded. They are not representative in their membership, because they are made by appointment; they are not judicial in their functions, because they have no power to enforce their decrees or rulings, and they are not executive in character, because they have been selected upon the theory that they were in some manner to represent something; and have been denied the power to enforce anything. They are in effect a confused and useless jumble of representative, judicial and executive functions, without the merits, and with all the demerits incident to co-ordinate branches of government. They are not responsible to constituencies as representative bodies; have no character in their quasi-judicial functions, and, as executive officers, there is too much of a division of responsibility to be effective, even were they given authority under the laws creating them.

Why commissions are created.

They are, as a matter of fact, the creatures of legislative cowardice and incompetency. Every time a popular clamor arises some member of the Legislature, lacking the courage or the capacity to deal with the subject, proposes the formation of a commission to take charge of the matter, and the action having a long line of precedents, and following the line of least resistance, a commission is raised. To this body is delegated just enough powers and duties to keep it in existence without accomplishing any solution of the question, and drawing their pay from the railroad corporations, or being paraded before the world in many cases as serving without salaries, a drain upon the resources of the State is effected which few people know anything about. Here is what the report of the Comptroller shows, in Document No. 20, now before the Convention: "State Railroad Commissions. Salary and expenses of the office — $25,285.36 in 1883, $66,225.37 in 1884, $65,023.50 in 1885, $68,509.25 in 1886, $62,443.25 in 1887, $52,434.55 in 1888, $53,987.07 in 1889, $52,024.32 in 1890, $67,660.66 in 1891, $56,609.10 in 1892, $56,405.56 in 1893, making a total of $626,553.99 in the eleven years. . . ."

An unsalaried commission.

Then there is the Commission of Fisheries. This commission serves without salaries, and might be supposed to be a very inno-

cent institution, but the report of the Comptroller, in Document No. 20, informs us that it has cost the State the following sums: Game and Fish Protectors — $306.70 in 1880, $5,536.82 in 1881, $6,102.70 in 1882, $6,084.71 in 1883, $9,938.42 in 1884, $11,205.67 in 1885, $12,025.86 in 1886, $10,058.12 in 1887, $11,882.76 in 1888, $16,190.35 in 1889, $17,157.70 in 1890, $16,409.04 in 1891, $18,492.50 in 1892, $23,958.65 in 1893, making a total of $165,290 in the thirteen years. . . .

Rapid growth of commissions.

By the same report from which these figures are gleaned, it is stated that the new offices created since 1890, the most of which are commissions, cost in 1893 a total of $1,027,654.31, making a grand total for the thirteen years of $6,847,892.72. These seven leading commissions alone, the Game and Fish Protectors, the Civil Service Commission, the Niagara Reservation Commission, the Commission in Lunacy, the Board of Arbitration, the Forestry Commission and the Railroad Commission aggregate an annual charge of $218,364, and I submit that fully one-half of this expenditure has no practical utility beyond affording a place for some one at the expense of the taxpayers of the State, or, what amounts to the same thing in the long run, out of the treasury of the private corporations.

Responsible public officials should supersede commissions.

I think it will be conceded that any system of offices which permits of the rapid and continual increase in expenditures shown by the figures which I have quoted, is not calculated to build up the public service, or to produce an economical administration of public affairs. The proposal under consideration does not contemplate crippling the public service in any degree; it does not propose to take from the Legislature the legitimate power to create offices which may from time to time become necessary. It simply abolishes the commissions which are at present in being, except those created of elective State officers, and leaves to the Legislature the power and the duty to create responsible public officials in the place of irresponsible commissions, at the same time insisting that the State shall not enter into partnership with any individual, association or corporation in the payment of its public officials

for their services. This is not a radical innovation; it is simply a return to correct, first principles in government, and there can be no higher duty than to preserve the highest dignity and the highest utility for our public servants, a condition which cannot exist under the rule of irresponsible commissions.

CHAPTER XXV

THE STATE LEGISLATURE

181. *Special Limitations on the Legislature*

THE prevalent distrust of state legislatures has led to attempts to restrict their opportunity for evil by placing in the constitutions fundamental and detailed limitations on their powers. The general character of these limitations may be gathered by a study of the following provisions from the constitution of New York: —

ARTICLE III

General provisions as to procedure.

§ 11. Each house shall keep a journal of its proceedings, and publish the same, except such parts as may require secrecy. The doors of each house shall be kept open, except when the public welfare shall require secrecy. Neither house shall, without the consent of the other, adjourn for more than two days.

§ 12. For any speech or debate in either house of the Legislature, the members shall not be questioned in any other place.

§ 13. Any bill may originate in either house of the Legislature, and all bills passed by one house may be amended by the other.

§ 14. The enacting clause of all bills shall be "The People of the State of New York, represented in Senate and Assembly, do enact as follows," and no law shall be enacted except by bill.

§ 15. No bill shall be passed or become a law unless it shall have been printed and upon the desks of the members, in its final form, at least three calendar legislative days prior to its final passage, unless the Governor, or the acting Governor, shall have certified to the necessity of its immediate passage, under his hand and the seal of the State; nor shall any bill be passed or become a law, except by the assent of a majority of the members elected to each branch

of the Legislature; and upon the last reading of a bill, no amendment thereof shall be allowed, and the question upon its final passage shall be taken immediately thereafter, and the yeas and nays entered on the journal.

§ 16. No private or local bill, which may be passed by the Legislature, shall embrace more than one subject, and that shall be expressed in the title.

§ 17. No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or part thereof, shall be applicable, except by inserting it in such act.

Prohibition of special and local bills.

§ 18. The Legislature shall not pass a private or local bill in any of the following cases:

Changing the names of persons.

Laying out, opening, altering, working or discontinuing roads, highways or alleys, or for draining swamps or other low lands.

Locating or changing county seats.

Providing for changes of venue in civil or criminal cases.

Incorporating villages.

Providing for election of members of boards of supervisors.

Selecting, drawing, summoning, or impaneling grand or petit jurors.

Regulating the rate of interest on money.

The opening and conducting of elections or designating places of voting.

Creating, increasing or decreasing fees, percentages or allowances of public officers, during the term for which said officers are elected or appointed.

Granting to any corporation, association or individual the right to lay down railroad tracks.

Granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever.

Granting to any person, association, firm or corporation, an exemption from taxation on real or personal property.

Providing for building bridges, and chartering companies for

such purposes, except on the Hudson River below Waterford, and on the East River, or over the waters forming a part of the boundaries of the state.

Protection of private rights.

The legislature shall pass general laws providing for the cases enumerated in this section, and for all other cases which in its judgment may be provided for by general laws. But no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, or in case the consent of such property owners cannot be obtained, the Appellate Division of the Supreme Court, in the department in which it is proposed to be constructed, may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners.

§ 19. The legislature shall neither audit nor allow any private claim or account against the State, but may appropriate money to pay such claims as shall have been audited and allowed according to law.

Restriction on power to appropriate money

§ 20. The assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes.

§ 21. No money shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within two years next after the passage of such appropriation act; and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient for such law to refer to any other law to fix such sum.

§ 22. No provision or enactment shall be embraced in the annual appropriation or supply bill, unless it relates specifically to some particular appropriation in the bill; and any such provision or enactment shall be limited in its operation to such appropriation. . . .

§ 24. Every law which imposes, continues or revives a tax shall distinctly state the tax and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object.

§ 25. On the final passage, in either house of the Legislature, of any act which imposes, continues or revives a tax, or creates a debt or charge, or makes, continues or revives any appropriation of public or trust money or property, or releases, discharges or commutes any claim or demand of the State, the question shall be taken by yeas and nays, which shall be duly entered upon the journals, and three-fifths of all the members elected to either house shall, in all such cases, be necessary to constitute a quorum therein.

Article VII

redit state.

Sec. 1. The credit of the State shall not in any manner be given or loaned to or in aid of any individual, association or corporation.

on lebt.

§ 2. The State may, to meet casual deficits or failures in revenues, or for expenses not provided for, contract debts; but such debts, direct or contingent, singly or in the aggregate, shall not at any time exceed one million of dollars; and the moneys arising from the loans creating such debts shall be applied to the purpose for which they were obtained, or to repay the debt so contracted, and to no other purpose whatever.

§ 3. In addition to the above limited power to contract debts, the State may contract debts to repel invasion, suppress insurrection, or defend the State in war; but the money arising from the contracting of such debts shall be applied to the purpose for which it was raised, or to repay such debts, and to no other purpose whatever.

§ 4. Except the debts specified in sections two and three of

this article, no debts shall be hereafter contracted by or in behalf of this State, unless such debts shall be authorized by a law, for some single work or object to be distinctly specified therein; and such law shall impose and provide for the collection of a direct annual tax to pay, and sufficient to pay, the interest on such debt as it falls due, and also to pay and discharge the principle of such debt within fifty years from the time of the contracting thereof. No such law shall take effect until it shall, at a general election, have been submitted to the people, and have received a majority of all the votes cast for and against it at such election. On the final passage of such bill in either house of the legislature, the question shall be taken by ayes and noes, to be duly entered on the journals thereof, and shall be: "Shall this bill pass, and ought the same to receive the sanction of the people?" The legislature may at any time, after the approval of such law by the people, if no debt shall have been contracted in pursuance thereof, repeal the same; and may at any time, by law, forbid the contracting of any further debt or liability under such law; but the tax imposed by such act, in proportion to the debt and liability which may have been contracted in pursuance of such law, shall remain in force and be irrepealable, and be annually collected, until the proceeds thereof shall have made the provision hereinbefore specified to pay and discharge the interest and principal of such debt and liability. The money arising from any loan or stock creating such debt or liability shall be applied to the work or object specified in the act authorizing such debt or liability, or for the payment of such debt or liability, and for no other purpose whatever. No such law shall be submitted to be voted on, within three months after its passage or at any general election when any other law, or any bill shall be submitted to be voted for or against. The legislature may provide for the issue of bonds of the State to run for a period not exceeding fifty years in lieu of bonds heretofore authorized but not issued and shall impose and provide for the collection of a direct annual tax for the payment of the same as hereinbefore required. When any sinking fund created under

Provi for sp indeb ness.

this section shall equal in amount the debt for which it was created, no further direct tax shall be levied on account of said sinking fund and the legislature shall reduce the tax to an amount equal to the accruing interest on such debt.

182. *Legislative Apportionment* *

The problem of legislative apportionment — one of the thorny questions of American politics — was thoroughly discussed in the New York constitutional convention of 1894: —

tisanship
pportion-
nt.

MR. SPEER. The proposition reported by your Committee on Apportionment increases the Senate from thirty-two to fifty members and apportions the districts so that thirty-two will be Republican and eighteen Democratic, according to the approved estimates of the experts of your Republican majority, as published in the New York Press, a Republican organ. The assembly is increased from 128 to 150. Of this 150, ninety-one are to be Republicans and fifty-nine Democrats. Each House will be Republican by over three-fifths. This apportionment is of such a nature that should the Democrats carry the State by a majority of 120,000 they would not be able to control both Houses of the Legislature.

e county
ognized
he ap-
tionment.

Then you adopt the English idea, the plan on which members of Parliament were elected in England's most corrupt days, of giving representation to counties irrespective of population. What is there sacred about county lines that you should so insist upon them in your proposition and report. The county of Putnam has a population of 13,325, a third of the number to entitle it to a Member of the Assembly, still you give Putnam county an Assemblyman. Is this because Putnam county is Republican? Schuyler county has 16,326 population, less than half the ratio you have fixed of 38,606. It is to have an Assemblyman because Schuyler county is Republican?

ıre votes
uired to
:t Demo-
tic
ators.

You seek to appeal to prejudice to array the rural counties of the State against the cities. You aim at arousing the agricultural interests against the commercial and industrial. What an appeal!

What a spectacle you are making not only to the residents of the cities, whom you chain hand and foot, but to the rural counties, whom you ask to vent on the cities the prejudice which you seek to arouse. Let us analyze this work of adroit partizanship which you have devised. You take the State Senators of 1892, with the citizen population of the State, 5,790,865, and with fifty Senate districts make your ratio 115,817. On the basis of last fall's vote, it will require 28,926 Democrats to elect a Democratic State Senator and only 17,062 Republicans to elect a Republican State Senator. Three Republicans will have as much representation as five Democrats. Such an apportionment is a work of art.

Discrimination against New York City.

Taking your own figures as printed in your report, Document No. 65, let us see where are the districts which have more than the ratio and where are the districts which have less. In Kings county you have 58,264 citizens left over, enough to be entitled to another Senator, a robbery of one Democratic Senator in addition to your gerrymander of the Brooklyn district. In every New York City district you have exceeded the ratio and disfranchised 34,160 citizens. In Westchester county you have exceeded the ratio 13,407. In these three counties alone, all of them Democratic, your excess is over 100,000. . . .

Why should the number be increased?

MR. MAYBEE. The basic idea of the whole scheme, the foundation upon which the whole scheme rests, is the great defect in this measure. It increases the number of Members of Assembly from 128 to 150; it increases the number of Senators from thirty-two to fifty, an increase of forty members of the Legislature, without any reason whatever. Will any gentleman tell me what good reason exists for this large increase in the membership of the Legislature? Has there been anywhere a demand for it? Have the people, by petitions, through the columns of the newspapers anywhere, made a demand for this increase? What good purpose does it subserve? The purpose of it is political and political only. There is no reason why an Assembly of 150 members will do the business of the State any better, any more satisfactorily than an Assembly of 128 members. There is no reason why a Senate of

fifty members will do the business of the State with any greater satisfaction to the people of a State than a Senate of thirty-two members.

Larger constituencies return better members.

It is a recognized principle in political history, which has become axiomatic, that the larger the constituency within a reasonable limit, the better representative will you get. This is not denied by any students of political history. This measure intends to narrow the constituencies, not to broaden them; intends to make them smaller, and not larger; and for a political purpose, and a political purpose only, contravenes the well-known theory of political history and political economy that a large constituency is more apt to return a good member than a small one. Now, the Congress of the United States consists of about 350 members. Those members represent between sixty and seventy millions of people, and yet gentlemen upon the other side of the House say that 128 Members of Assembly are not enough in number to fitly and adequately represent about six millions of people.

Local divisions are recognized in making apportionments.

MR. CHOATE. Mr. Chairman, it is not true that direct population, popular count, man for man, has ever been in this State, the basis of representation in the Legislature. We are not a pure Democracy; we are not an impure Republic. We are a representative government so far as its legislative body and the dealing out of legislative powers are concerned. For the great offices of State, the Governor and other great officers, we vote man by man and the majority rules. In the highest judicial court of the State we vote in the same way, popular sovereignty, popular majority, or, at any rate, popular plurality. It has never been so, it never will be so, it never can be so, in respect to the Senate and Assembly. We must be represented by districts; we must be represented by counties; we must be represented by some form of territorial division. When my friends on this side of the chamber concede, as they must concede, as they have conceded, that, they give away the whole of the argument which Mr. Osborn presented, based upon equal popular representation. Why, there is the little county of Putnam of his, with 13,000 people and the adjoining county of

Westchester with 127,000, that, according to his theory ought to have ten times as much. Nobody has ever dreamed under this or any other apportionment, of giving it more than three times as much.

Counties have equal rights in the legislature.

What do the people of this State come to the Legislature for? To make laws for the whole State; to represent the whole State, and each part of the State is interested in the whole. My friend down here upon this side talked as if all the wealth accumulated in the city of New York ought to lie at the basis and foundation of apportionment. Who owns the magnificent harbor which is the foundation of all her prosperity and those great rivers which meet to kiss each other at her door? Why, the little county of Niagara might just as well claim to own for itself the Cataract of Niagara, that other wonder of the world at the other end of the State. No, sir, they come here representing these divisions, and the first rule always has been, and always will be, I believe, that each one of these divisions, these counties which have been formed as political divisions for the very purpose of being the centres of home rule, if you please, of local government, — every one of them has the right, and the equal right; and if there were but sixty counties, if there were but sixty representatives, they must be distributed among these sixty counties, upon every doctrine that has ever prevailed in this State; and the little county of Putnam in that case would be entitled to the same number in that assembly as the great county of New York.

Florida cited.

Mr. Chairman, if you want to go, for example, to good Democratic authority, I want to give you some on this doctrine in support of this proposition that is represented in this scheme; that is to say, that the greater the territorial extent of a little and poor county the greater shall be its representation in the popular branch of the Legislature. Florida — is not that a good Democratic State? Did anybody ever hear of a Republican entering its borders except for the purpose of summer recreation or for the investigation of fraud? Florida says: "The representation in the House of Representatives shall be apportioned among the several

counties as nearly as possible according to population; provided, each county shall have one representative at large in the House of Representatives; and no county shall have more than three representatives." Think of that.

The practice in Georgia.

Georgia — is not that a good Democratic State? Here are States that are all of one way of thinking. Georgia apportions her one hundred and seventy-five representatives among the several counties thus: "To the six counties having the largest population, three each; to the twenty-six counties having the next largest population, two each; to the remaining one hundred and five counties, one each. After each United States census, the General Assembly may change the above apportionment so as to give to the six largest counties three each; to the twenty-six next largest, two each; but in no event shall the aggregate number of representatives be increased." Is that good Democratic doctrine?

183. *Legislative Procedure*

The importance of the details of legislative procedure is fully shown by the following speech made in the New York constitutional convention of 1894, by Mr. Vedder: —

Evils of amending on the third reading.

Mr. Chairman, the object of this amendment, I think, was apparent to each delegate as it was read. Under the Constitution, as it now is, a bill may be amended upon its third reading. This prevents a bill from being amended on its third reading. Under the Constitution, as it now is, a bill may be passed when it is not printed. An amendment may be made to it which changes the whole nature of the bill, and without any of the members of the Legislature knowing anything about it, except, perhaps, the mover. Especially is this true during the last days of a session. There has probably been more bad legislation by reason of this defect in the Constitution than because of any other. This is the way it works: The Clerk announces the reading of a bill; he begins its reading, and a member of the Legislature offers an amendment which no one may understand but himself, and the amendment is adopted, and the reading goes on and the bill is passed as amended.

In the hurry and probable confusion of the moment, no one but the mover of the amendment may know exactly what it is or how it affects the nature and subject-matter of the bill. It may radically change the bill, and yet it passes, reliance being placed on the statements of the mover of the amendment, who may himself have misjudged its effect in changing the bill.

This will prevent that. This makes it imperative that every bill must have been printed and upon the desks of the members at least one calendar legislative day before it can be voted upon or before it can be passed, and on its third reading no amendment can be made to it, nor can any debate be had.

Important amendmen at the last hour.

It is an exceedingly common thing, and happens at every session of our Legislature that an apparently insignificant amendment is offered on the third reading of a bill. The bill passes with it. The amendment may be innocent of itself. It then goes into the engrossing room, and what was left undone to change the nature of the bill on its third reading is done in the engrossing room, and it goes to the Governor, and no one knows how the amendment got in, and it can be traced to no one in particular. All we know is that the members have voted upon a certain bill, and when it reached the Governor it was an entirely different bill.

184. *Problems of Legislative Reform* *

The difficulties in the way of sound legislation and suggestions for improvement in legislative methods are thus summed up by a commission appointed in New York in 1895 to investigate the whole problem of intelligent law making: —

How bills are presented.

By far the major part of the bills which are presented to the Legislature are drawn at the instigation of private or local interests, and frequently without regard either to their effect upon the general body of legislation of the State, or upon adverse interests, or upon any interests other than those which prompt the drawing of the bills. They are presented during the greater part of the legislative session practically without limitation as to time of introduction, and without notice of their purposes to interests

to be affected. They come from the Legislature in such bulk and numbers that their proper consideration is impossible, even on the part of the committees which have them in charge, whose duty nominally it is to digest, examine, study and have hearings upon every measure which is submitted to their care.

The members cannot examine them critically.

No reflection is intended to be made upon the committees or their members for the non-performance or partial performance of a duty which has become too onerous for human possibility. When presented to the Senate or Assembly, and placed upon the files of members in printed form, they are presented with so little method as to procedure, when they are to be considered on second reading or in committees of the whole, that it is practically impossible for even the best informed and most industrious legislator to understand what changes are being made in the existing law, or to keep himself so informed as to the major part of the legislation, during its passage in the Senate or Assembly, as to exercise a deliberate judgment before he votes. It is no exaggeration to say that it is physically impossible for him to even read the contents of his files during the session, in addition to the performance of his other duties. The consequence is that usually each member takes an active personal interest in the bills which come from his own constituency, and sometimes takes an interest in the general bills which come before the legislative bodies, and, as to the remainder, constituting the vast majority of the bills, is compelled, in the language of Senator Edmonds, to enact, by his vote, the measures into laws "in the hope that fortune rather than time, study and reflection will take care that the public suffer no detriment."

This Commission invited the opinions of persons of large legislative experience, and at several sessions have been favored by their attendance and their views. There has been a general agreement with the views of the Commission on the part of those who have been thus invited and attended, that to secure better legislation in the future it is necessary to methodize and improve legislation in the following particulars:

Private local bi

First. — That all private and local bills, including bills which relate to municipalities, shall be filed either before the beginning of the legislative session or within thirty days before their presentation to the Legislature, unless the Governor of the State takes upon himself the responsibility of making a special recommendation of urgency; and that each bill shall be accompanied with proof that a notice was duly published or personally served, or both, as the circumstances of the case may require, on every interest which may be affected by such legislation.

The op portunit objectio

Second. — That the petition for such legislation shall set forth its general scope, object and utility. This petition may be answered in writing by any adverse interest. Such petition, and one or more answers which partake of the nature of pleadings in a civil suit, shall be filed with the bill, and these petitions and counter-petitions, duly signed, shall accompany each bill of this character during the whole of its legislative progression.

The rev sion of laws.

Third. — That Committees of Revision, both Senate and Assembly, should have their powers enlarged for the consideration of all measures, both public and private or local, and that each of such committees shall be assisted in its labors by a lawyer of at least ten years' standing, with an adequate salary to insure proper talent, who shall have such assistants as may be necessary. These committees to act as advisory committees for redrafting bills, and for recommendations as to their effect, with suggestions as to their operation upon the general body of the law, and to point out constitutional or other defects. Such counsel to be appointed by the Governor, Lieutenant-Governor and Speaker of the House, for a fixed term.

Fourth. — That a day calendar shall be printed one day in advance and distributed among the members.

Public measure

Fifth. — That general public measures should be referred before passage to the Commissioners to Revise the Statutes, to report upon the effect of such measures and their place in the body of the statute law.

Sixth. — That committees of the Legislature should be empowered to take testimony.

Seventh. — That every committee should be required to report the private and local bills which have been submitted to it, with the reasons for its action, within a certain number of days after the bill has been committed to its care.

Eighth. — That some of the Senate Committees should be enlarged, particularly such committees as have imposed upon them the most onerous duties of the legislative session, such as the Committee on Cities, the Committee on Finance, the Committee on Judiciary.

enses ed by rested ies.

Ninth. — That a proportionate share of the printing expenses incident to a legislative session, which amounted, during the last session, to the sum of $200,000, should be borne by the parties interested in the bills, and in whose interest and at whose request legislation is considered, particularly monied corporations, stock corporations or private individuals.

Tenth. — The general laws should be completed as rapidly as possible, and all public statutes should be incorporated into them or into one of the Codes.

Eleventh. — That all bills amendatory of the general laws, or of the Code, should refer briefly in their title to the general subject to which they relate.

Twelfth. — That all amendments to City Charters or to the general municipal incorporation laws should briefly state in the title the subject of the sections of the Statute which are proposed to be amended.

ninis- ve sures.

Thirteenth. — That with reference to every bill affecting any department of the state government, or the general administration of the law subject to the supervision of such department, notice thereof shall be given to the head of the department having the administration of such subject under his supervision, and an opportunity afforded him to be heard before the bill is reported or passed.

185. *The Legislative Committee of Inquiry*

Owing to the complexity of the problems which the modern legislature is compelled to meet, it has become a common practice to appoint special committees to investigate specific problems and report either suggestions for legislation or complete laws covering certain topics. This practice is illustrated by these extracts from a report of a joint committee appointed in New York to inquire into the subject of highway improvement: —

To the Senate and Assembly:

Creation and organization of committee

The Joint Committee of the Senate and Assembly, appointed pursuant to a concurrent resolution duly adopted May 29, 1907, submits the following report:

The resolution directed the Committee —

> to inquire into the subject of the methods of construction of improved highways and the maintenance and repairs of all highways in the State, together with the general subject of a proper development of the whole system of highway improvement in the State, and whose duty it shall also be to revise and amend the highways laws, and to report to the next Legislature on or before February 15, 1908, the result of said investigation, and revised Highway Law, together with any other bills necessary to carry into effect the recommendations of the general committee.

The Committee organized July 24, 1907, by electing Jotham P. Allds as chairman, Charles R. Hotaling as sergeant-at-arms, Mrs. J. L. Murray a stenographer, and authorized the employment of Frank D. Lyon and Frank B. Gilbert to assist in the revision and codification of the Highway Law and also voted to dispense with counsel other than the employment of the assistants upon the revision and codification.

Local authorities at the hearings.

The Committee began its public hearings at the council chamber in the city of Buffalo upon October 14, 1907, and closed its hearings in the city of New York on December 30th, having held hearings at Buffalo, Rochester, Syracuse, Utica, Watertown, Albany, Newburgh, and New York, and having given to the clerk and chairman of the board of supervisors of each county in the

State due notice of the time of the several hearings and having offered an opportunity to be heard to the public officials of each county in the State, other than those whose whole territory was within the limits of a city. The committee was attended upon by the county representatives, including the chairman of the board, and county engineer, where the same existed, and the chairman of the committee on good roads. In many instances the full board of supervisors of the respective counties were present and all of the counties affected by the subject were heard in person except that in a few instances they communicated with the Committee in writing and in two instances only were the counties not represented owing to the fact that the address of the clerk of the board of supervisors was defective and the notice of the hearing in that locality was later returned to the chairman of the Committee by the post office department as undelivered.

The present law on highways examined.

Before commencing its public hearings, the Committee consulted with the State Engineer and Surveyor as to his views of the present condition of the Highway Law in this State so far as the same related to the general repairs of all the highways of the State and also as to the working of the present statutes for the improvement of main highways and the maintaining of the same and he not only expressed to us his views as to the general plan and scope of hearings, but at several hearings we were attended by a representative of his office and thereby received many valuable suggestions.

The laws of other states investigated.

The joint resolution requires your Committee first, to investigate and report upon the methods of a proper development of the whole system of highway improvement; second, to provide for construction and maintenance, and third, to completely revise and codify the present Highway Law. We therefore felt it incumbent upon us to secure the fullest expression of the views of the local officers of every section of the State; to examine the statutes so as to determine the methods adopted in European countries and in the sister States of this country and, finally, we determined to obtain the views of the State Grange and secure the testimony of the

chairman of the highway commissions of Massachusetts, Connecticut and New Jersey as to the practical workings of the respective statutes in those States because a large amount of work has been done in each of these commonwealths and these three have each a different system. That of Massachusetts being the centralized system, Connecticut the town system, and New Jersey may be characterized somewhat more properly as the co-operative system.

A digest evidenc and a cc plete la submitt

It is not the intention, within the limits of this report, to discuss the great variety of views which have been presented to your Committee. Two volumes of testimony have been taken and a careful digest of other State and foreign laws has been made and carefully examined by the Committee. A digest has been made of the testimony taken to enable the Committee to form an intelligent impression of what may fairly be said to be the consensus of opinion with reference to the larger matters of policy which had to be determined by the Committee before it could make a recodification of the Highway Law. Your Committee believes that the plan and details of the revised code herewith submitted fairly represent the average judgment of the local officers combined with the experience of adjoining States.

186. *The Legislative Reference Bureau*

These paragraphs from an interesting article in the *Review of Reviews* by Professor J. R. Commons describe the establishment of an important institution in Wisconsin to assist legislators in securing information on problems coming before them for solution.

The col tion of literatu

On his appointment in 1901 Dr. McCarthy, the legislative librarian, did a very sensible thing. He started a clipping-bureau. He collected all of the pamphlets, bulletins, reports of commissions, magazine articles, and the like that he could get free. He accumulated as many duplicates as possible for free distribution. He classified them and arranged them under proper headings, paying special attention to the subjects that he knew would come up at the next legislative session. He searched the libraries of

the several State departments and brought over whatever he thought would be an aid to the legislature. By the time the session met in 1903 he had, not what would be called a library but an up-to-date, live set of aids to law-makers.

istance
:red to
slators.

But this was preliminary. As soon as the elections had been held he sent to all the members of the incoming legislature a circular, telling them something of what he had on hand, and offering to assist them by furnishing information, copies of laws enacted or bills introduced in other States, etc., on any measure that they proposed to bring before the legislature. Over one hundred requests came in, and he forwarded by mail his clippings, pamphlets, and bills. When the legislature assembled he moved his collection to a room on the same floor. He circulated among the members, brought them to his library, and showed them what he had. He learned what they wanted and, if he did not have it on hand, he immediately wrote or wired to all parts of the country to get it.

rk for
slative
mittees.

When the committees were appointed and began their work he helped them in the same way. He sent hundreds of copies of their bills to experts, commissions, lawyers, and informed citizens in Wisconsin and other States, asking for criticisms, improvements, and accounts of whatever experience they might have had on the points involved. If a lobbyist made a statement before a committee, he would have replies . . . within a day or two . . . from the parties who knew the facts. The chairman of the Committee on Claims has given several instances where these replies saved the State hundreds and even thousands of dollars. Other committees were aided in a similar way. The committees on railway legislation, primary elections, and civil-service reform at the sessions of 1903 and 1905 had before them . . . the bills introduced in other States, the hearings on those bills, arguments of counsel, the best pamphlets and magazine articles, besides pertinent letters from the best-informed men of the country.

187. *The Evils of Over-legislation*

In an important address before the American Bar Association, Judge Alton B. Parker discussed the problem of hasty and prolix legislation in the American states.

The zeal for new laws

Few questions have been more discussed during recent years than the increasing tendency of legislative bodies to propose and to enact new laws. Scarcely any agitation of a public or a moral question is so unimportant that it does not produce, in nearly half a hundred state capitols, a series of bills supposed to represent it in all its varied and shifting phases. It has become far more common to look for a new law for the punishment of an old offense or for defining anew the relations of individuals to each other than it is to invoke those powers or remedies by which, over many centuries, while law has been gradually taking fixed form, men have been able to punish crimes against society or to settle their own differences.

Few new principles adopted.

And yet every man who has had occasion to study the question, even in its narrower bearings, has been forced to conclude that but a small percentage of proposed new enactments involves a new principle, or even a new policy. It rarely happens that an offense is committed for which no proper punishment has been provided, and it is a long time since any real question has arisen between men to demand legal settlement impossible under existing law. . . .

The clam for victim

Legislation of this order is promoted in many ways. One of the most efficient agencies is popular clamor. This may be produced by the demagogue, whose interest it is to make the part appear to be the whole. It may be started by the robbery of a savings bank, or by adulteration on the part of some manufacturer, or dishonesty by the head of a business corporation, or in any one of a hundred different ways. Such an agitation will naturally be encouraged by sensational newspapers, and by the oftentimes scarcely less sensational pulpit. As it goes on it gathers force until it passes into one or the other of the many forms of that hysteria which demands nothing so much as a victim. In

such a period the recurring session of a legislature comes in its due course, or an ambitious or sympathetic governor calls an extra session. Thus dozens of useless laws are placed upon the statute books, every one of which chokes the channels of justice.

The effect of the failure to enforce old laws.

Another fruitful source of legislation is the neglect or failure to enforce existing laws. A lax public sentiment, plus an incompetent executive, renders of no effect a wholesome law until the breaches of it become so numerous and offensive that an aroused and indignant public sentiment demands relief. The result is often a demand for further legislation, because it is erroneously assumed that the wrong suffered by the public could not have happened had the laws been adequate for its protection. And a crop of new and unnecessary statutes is the outcome — unnecessary because all that is needed is rigid enforcement of existing law.

The effect of executive influence.

In many cases the misdirected or ignorant zeal of an executive officer is responsible for many new and useless laws. Such an official — generally with the elements in him of the agitator, and often of the demagogue — has been carried into office, after an hysterical canvass, under the promise to prosecute certain kinds of accused persons. Once elected, he takes up his work in the same spirit that had characterized his electoral campaign. He indicts with great facility. He tilts against classes or individuals, only to find that juries do not convict, or that, if they do, courts will not sustain. Then comes a new harvest of laws in order to justify or supplement the zeal of men who may be honest, but who are wanting either in judgment or knowledge. In addition there is nothing which can more surely produce contempt of the law than the spasmodic activity to which some prosecutors are addicted. . . .

The crusades of special interests.

Another favorite form of legislation is that for the benefit or at the behoof of a party. The continual tampering with election laws and regulations; the creation of useless offices, political or judicial; crusades against or favors conferred upon corporations or interests; the re-organization of city governments; the legislation of one class of officials out of office, in order to put

another in; the institution of a state constabulary for the purpose of controlling the police of great cities for party or personal purposes; the tilting against opponents, a process common to many legislative bodies — all these are productive of such infinite and far-reaching harm as to emphasize the doctrine that no partisan legislation, either proposed before the bodies themselves or pushed in their committees, or enacted into law, can be fair, just or enduring.

Committees and log-rolling.

The forms of legislative waste here enumerated, and the causes which promote them, serve to show why it is that an almost complete change has come over the character of our legislative bodies. Their presence gives the speaker almost arbitrary power, makes committees into a new form of tyrants, develops management and intrigue into fine arts, produces bosses as a natural result, and, while keeping the larger men out of legislative halls, puts small ones into their places. Log-rolling becomes a necessity, and mischievous or useless bills pass easily and almost by sufferance. The existence of these elements also promotes conflict between urban and rural interests in the hope that one or the other may escape a fair share of that taxation which always grows as a result of such a dangerous rivalry.

The burden on the judiciary.

It is not alone in the domain of law-making and the legislator that these abuses are potent. They add to the labor of the judiciary. Upon it is thrown for adjudication, year after year, a body of work absolutely unnecessary, and at great expense to the public and often to private individuals. The constitutionality of much of this new legislation is continually questioned. So true is it that a substantial percentage of the questions brought before Appellate Courts are related to doubts of the validity of the laws under which actions are brought. Indeed, in the State of New York, in a period covering about twenty years, the constitutionality of over five hundred statutes was challenged in the Court of Appeals. The dovetailing of new legislation into existing law, and the cost of construing the possible meaning of a legislature, also enter into a considerable part of the annual output of twenty

thousand decisions rendered by Appellate Courts. Many of these mushroom enactments are permitted to slumber by common consent. But this is dangerous, because, in such cases, offensive laws remain upon the statute books, and may later be evoked for mischievous purposes. . . .

Legislation in England and the United States compared.

With more than twenty-five thousand pages of new laws added to the statute books each year, it is apparent, if the suggestions so far made be well founded, that relief is absolutely necessary. During the years between 1899 and 1905, England's Parliament, legislating for the needs of forty-two millions of home population and millions of dependents, passed an average of only forty-six general and two hundred and forty-six special laws — the number of the latter being swelled by the necessity for granting franchises for railways and charter amendments for cities. One of the potent elements in the working out of this to us most astonishing result has been the presence of a salaried draftsman — a lawyer of high repute, well paid for his services — whose duty it is, not only to study the phraseology of proposed laws, but also to make a thorough examination of existing legislation, for the benefit of Parliament and its committees. The publicity of all committee hearings and the report of their proceedings in the press have also contributed much to promote this result. While our complicated system of local government will account for a considerable part of our vast volume of legislation, the greater part of it is due to causes such as I have suggested.

188. *Legislatures and Railways*

The following letter from Mr. J. T. Brooks, of the Pennsylvania Railroad Company, throws an interesting light on the relation of public officials to railway corporations: —

Office of the Second Vice-President,
PITTSBURG, July 20, 1894.

Hon. Joseph H. Choate, President Constitutional Convention, Albany, N.Y.:

. . . I have seen the evils of the pass system grow from very small beginnings to what I regard as very great and deplorable proportions. I have tried to persuade officials of other railway companies to follow my example, and I have endeavored to persuade the Legislature of Ohio, in which State I have always lived, on different occasions, to pass prohibitory laws on this subject, but in each instance and always, without avail. There was a time when public officials were content to receive occasionally a trip pass for themselves. They have learned to ask for passes for themselves, for members of their families, and for political adherents and others. They not only ask for passes good over lines which are controlled by the officers to whom they apply, but they ask for passes over connecting lines to distant and remote parts of the country, good at all seasons of the year. They not only ask for trip passes for themselves and their friends, but they ask for annual passes for themselves and their friends; and no matter how many passes may be granted to a single individual, if a single request be refused, the enmity of that official is aroused, and his vengeance exercised if he has an opportunity so to do.

The growt in the demand f passes.

I have known a member of the Supreme Court of the United States to apply for free transportation the money value of which, in a single instance, was between two and three hundred dollars. Governors of States, United States Senators, Members of the House of Representatives, members of every department of State Government, from the Governor to the janitor ask and expect to receive these favors.

In consequence of the position I have taken, and persisted in on this subject for several years, I have seen county auditors and State boards of equalization who hold the power of taxation over us, exercise it tyrannically and unjustly to the detriment of the companies I represent. I have known of the chiefs of the executive departments in the State government combining in the Capitol during sessions of the Legislature and at other times, to wreak their vengeance upon our company because they were not served with annual passes by our company, as by other

Denial of favors leads to retaliation

companies. I have known of the passage of resolutions in state legislatures, made against the companies I represent, accompanied by suppressed howls of delight, for the reason that the members had not been served with passes according to their wishes and requests. I have received offers from men in public station to serve our company in their official capacity, if I would give them passes and I have received threats from the chiefs of executive departments of State because I declined to give them annual passes as other railroads have done. I have seen other railroad companies issue these passes without stint to all persons in all grades and stages of public life, and receive a direct pecuniary benefit therefrom, and have seen those benefits withheld from our company because I did not do as other men did in the granting of passes.

ors for
officials.

An officer of a rival railroad company recently told me that he had taken the entire Board of Tax Commissioners of a certain State, with their families and certain friends, from a large inland city to Fortress Monroe and Washington and back home, furnishing the comforts of a Pullman car, free transportation, and all expenses of the journey, and receiving, as he said, as a direct reward thereof, a reduction in the appraisement of the property he represented, equivalent to many thousands of dollars a year. . . .

ing
es is
ng
ey.

A pass over a railroad is the equivalent of money and few men in civilized society are above the temptation of receiving it. In very many instances railroad companies receive a direct and pecuniary equivalent of the pass which they give. In other cases the public officials who receive passes quietly enjoy the saving of money, which the passes afford them, and discharge their duties impartially as between the railroad company and the public precisely as if the passes had not been given. I regard the tendency of the system pernicious in the extreme. The difference between giving the thing of money value and the money itself, to a public official, is slight. If railroad officials and public officials become accustomed to the giving and receiving of things of value, the official character of the recipient being the only

consideration thereof, the conscience of both railroad and other officials becomes demoralised and corrupted, and men on both sides soon learn that money might as well be given as passes for the purpose of controlling the action of public servants.

A source o distrust of corporatio

I have always thought that the practice of railroad companies in giving these passes to servants of the public was, and is, one important factor of the distrust and denunciation in which the common people indulge against railway corporations. It certainly needs no argument to prove that free transportation is a thing of money value and that these passes, given to men in public life, who, in the exercise of their public functions, are required to pass upon the rights of railroad companies, as between railroad companies and the public, are given for a consideration, and, no matter what the forms or terms of courtesy on which those passes are given, the selfish and improper motive is always apparent. The present is a good time for law-makers and officials of railroad companies to take heed of the signs of the times, and regulate their conduct according to the ancient principles of justice and patriotism.

I hope the Constitutional Convention will enact a thorough provision on this subject. It is imperative that the Convention shall find some way, if possible, by which Constitutional provision may enforce itself, for I have no hope that any Legislature may be found to be unselfish and patriotic enough to deny themselves the privileges of free transportation for themselves and friends. . . .

Recent examples blackmail

Within the last few years blackmailing legislators have been introducing bills for the taxation of sleeping-car companies, express companies and telegraph companies. The result is that passes are being issued by these various organisations, in greater or less number, and telegraph passes can now be found in the pockets of nearly all members of the Legislature in all the important States.

I hope the Constitutional Convention of the great State of New York will set a noble example on this subject. . . .

Yours respectfully,

J. T. Brooks.

In the debate on the prohibition of railway passes in the New York constitutional convention, Mr. Powell ironically suggested that the principle should be applied at once: —

The importance of the subject denied.

MR. POWELL. Mr. President, it occurred to me when we occupied the greater part of a day in discussing this proposed amendment that this convention was bringing its dignity down to about the lowest point that was conceivable. When we get so low that we propose to introduce the consideration of railroad passes into the Constitution of the State, I think it is about time for us to adjourn and go to our respective homes and see if we cannot find something more important to engage our mental activities. Gentlemen, you will remember on that afternoon what a magnificent outburst of civic virtue we had. I confess, Sir, that with a railroad pass in my pocket, like the publican who went up into the temple of old, I stood afar off in the presence of these Pharisee protestations and bowed my head and smote my breast when I realised what a miserable sinner I was, and in order to test the sincerity of this convention, I drew a resolution that afternoon for the purpose of presenting it at the evening session. It occurred to me that if railroad passes were such dangerous things for judges and legislators and state officials to have that they must be equally dangerous to the members of this convention and, laboring under the suspicion that there might possibly be in this convention other sinners like myself, I offered at the evening session a resolution providing that any member of this convention who should thereafter ride upon a railway pass should forfeit his per diem during the rest of the session of this body. But, sir, to my amazement, this convention which only a few hours before had expressed its detestation and fear of railway passes, instead of honestly taking its own medicine and purging itself of this dangerous article, voted unanimously to lay my resolution on the table and it has lain there ever since.

189. *The Organization of a Lobby*

Mr. Richard A. McCurdy, in his testimony during the Insurance Investigation in New York in 1905, gave this description

of one of the methods employed by insurance companies to influence legislative action in a Western state: —

Educating a legislature.

Now the suggestion of the name of Mr. Lewis recalls to my mind most vividly an incident that he told me of almost a winter's season being occupied some years ago at or near the capital of a remote state, I have forgotten which it was, possibly it was Michigan or Wisconsin, or Iowa, I think one of those three States. He said that he had been occupied nearly all winter in attempting to educate, not to corrupt, but to educate the legislative mind in regard to a bill before it. He told me he went first to the capital of the State, and got the red book, or blue book, or whatever it may have been. He found out the localities from which each member of the legislature and the senate came. He found out all the men, their putative political god-parents, if I may so call them; their relations and influential men, all the men who were influential with them in their neighborhood.

Pressures from prominent constituents.

He made journey after journey up and down from the capital to this town and that town and the other town, making the acquaintance of these men, and getting them to go there during the session of the legislature. Paid many of them, not all lawyers. They were men who would not leave their business, the presidencies, or cashierships of banks, and make a trip up to the capital of the State unless not only their expenses were paid but something else.

Washington influences set in motion.

He went on further, and he said he went to Washington during that session of the Legislature. It took him some weeks to make the acquaintance of the Senators and members of Congress in the House of Representatives from that state, so that he was able to get upon a friendly footing with them, and that they would listen to him and hear his statement of the damage that would be wrought to the company and to all life insurance provided this measure which was then sent was passed, and he got from them letters of introduction back again, and that was the substance of it, that all that winter he practically had been engaged on that business and without one dollar being expended excepting for the fees paid to

lawyers, the expenses paid to laymen, the compensation in many cases paid to laymen.

Payment for services.

Q. For what? A. For the services that they had rendered sitting down and listening to Mr. Lewis explain the reasons why he wanted their help and assistance and in taking trips to the Capitol, travelling expenses and compensation for that class of service. And he told me the circumstance without the intimation or the belief on my part he had paid one dollar for anything excepting legitimate purposes, and he charged, — I am willing to testify that in my judgment it was a very inadequate sum.

No improper use of money.

Q. For his services? A. For his own services, he charged $5000 beyond his expenses, which were a good many thousand dollars more, how much more I don't know. I give that merely as an illustration and to repel the assumption that necessarily money paid through lawyers whose names are not given must be for improper purposes. It would not be possible or it would not be proper to publish the names of the people that he had employed to help him and who did help him in such a case as that.

190. *Legislation against Corporations*

During the Insurance Investigation mentioned above, Mr. W. F. Thummel classified legislation against corporations as follows:—

"Strike" bills.

I would say generally this, that there are several classes of legislation that we meet constantly, in almost every legislature. The first and most numerous one by a great deal being what is sometimes called strike bills. So far as I have observed, those bills are prepared by outsiders. Very seldom, I would say, by a member of the Legislature, and they are presented usually to some new member of the Legislature and with a — I am drawing on my own idea for this part of it — with probably the suggestion that it would redound to his reputation, and it is introduced. Then, of course, the natural result would be that the people who were responsible for its introduction would seek employment and try to kill it. There are a good many of that class of bills at one time and another.

Then there is another class, which is very much more dangerous to the companies, that require a great deal more effort to prevent their becoming laws, and that is the class of bills that are inspired by other corporations for the purpose of relieving themselves in some manner from some obnoxious provision of the law. Usually it would take this form, that there was some regulation required by a corporation that had a small revenue to it, and for the sake of illustration we will say that the entire revenue to be derived from that particular part might be $5,000 in the State, and the corporations that would be affected by that would introduce, or have introduced, a bill changing the revenue act. And it would be very likely to pick upon life insurance premiums as the vehicle to convey more taxes into the treasury of the State. And somewhere in that bill there would be a provision that would repeal the particular provision. Along in that line I know of at least two instances where the fire insurance companies have sought to be relieved of what to them were very onerous provisions through the medium of a general insurance bill that would have a repealing clause in that it would repeal those provisions to which they objected.

Bills inspired by other corporations.

Another class of bills that are very vexatious are bills that are presented by attorneys who have been unsuccessful in litigation. There are not very many of these, but there are some, and they have been unsuccessful because of certain provisions in policies. I have known this to happen in both fire insurance and life, and they would introduce an act which would make that particular provision of a policy null and void in the future.

Bills of defeated attorneys.

Then there is the class of bills that I call honest bills, and that is sub-divided into two. The first class might be a very mischievous bill but the framer of it — and he is usually a member of the Legislature as far as that is concerned — would be honest in his conviction and really would be seeking to do good to the general subject, and then there is the bill that is prepared by the man who knows what he is talking about and that is actually good for the business, that will meet a defect in the law, and that kind of a bill

Honest bills

we are always very glad to see enacted into a law. Anything that is for the good of the business we are always very glad to see passed.

191. *Keeping Track of Legislators*

Owing to the slight interest taken in the business of state legislatures and the brief accounts that appear in the newspapers, it is difficult for the voter to form any judgment on the qualifications of his representatives. To overcome this difficulty in New York City, the Citizens' Union, a municipal organization, publishes annually a small pamphlet containing the records of New York representatives at Albany. These extracts indicate the character of the publication: —

BURNS, WILLIAM H. (Dem., 4th Dist., N.Y.) — Introduced 12 bills, providing for:

Pensioning veterans who have been in service of the State for 15 years and who have reached age of 65; payment of claim of Bartholomew Moynahan, stenographer, Supreme Court; requiring that ingredients be printed on boxes and packages of confectionery; payment of not less than $1,500 per year to persons engaged in preserving public records; prohibiting adulteration or misbranding of foods or drugs; amending charter providing that mechanics employed by the city shall be paid for holidays and half holidays; declaring contracts to control rates of commodities to be against public policy and illegal and void; amending charter creating position of pilots and masters of fireboats and fixing compensation at $1,500 per year (Chap. 547); pensioning veterans who have been in the service of the State for 15 years; authorizing admission to bar examinations persons who have served three years as Magistrates, Coroners or Justices of the Peace; amending charter requiring assistant engineers appointed by City Department to be of at least five years' standing; increasing salary of Deputy State Engineer (Chap. 586).

RECORD: Member of Rules Committee, a position of much influence, yet continues a typical henchman.

COLLINS, DANIEL J. (Indep. League, 15th Dist., Kings) — Introduced 5 bills:

Making it a felony to sell morphine, opium or cocaine without prescriptions; two-cent ferriage on Greenpoint ferry; three-cent fares on elevated, subway and street cars between 5 A.M. and 8 A.M. and 5 P.M. and 8 P.M. in New York City; amending primary election law generally; abolishing offal docks in certain wards in Brooklyn.

RECORD: Inconspicuous and a cipher in legislation.

COLNE, WILLIAM W. (Rep., 11th Dist., Kings) — Introduced 3 bills:

Extending jurisdiction of Brooklyn Church Society of Methodist Episcopal Church; prohibiting trust companies from establishing branches, except trust companies in New York City may establish branches in any part of the State, with the consent of the Superintendent of Banks; erecting monument of John C. Fremont in Rockland Cemetery.

RECORD: Fairly useful and attentive; has not improved over record of last year.

DONNELLY, JOHN H. (Dem., 13th Dist., Kings) — Introduced 1 bill:

Providing for fixed salary and uniforms for City Marshals.

RECORD: Inactive; useless.

CHAPTER XXVI

THE JUDICIAL SYSTEM

192. *The Independence of the Judiciary**

THE problem of what constitutes judicial independence and legislative incroachments upon it is thus treated by Mr. Henry B. Brown, in an address delivered before the American Bar Association in 1889: —

effect ort s on ial in- ndence.

There is a clear distinction between the independence of the judiciary as a governmental power, and the independence of the several judges composing it. There is here all the difference between a theoretical and practical independence — in other words, between independence in law and independence in fact. Thus the election or appointment of judges for short terms does not trench in any way upon the judicial functions; but it subjects the judges, as men endowed with the ordinary weaknesses of humanity, to temptations wholly inconsistent with that consciousness of independence, which lends such powerful encouragement to a fearless discharge of duty. Judges ought not only to be removed from temptation, but as far as possible from suspicion. If their reappointment or re-election is made at frequent periods, dependent upon the popularity of their decisions, to that extent their independence is subjected to the whims of the executive or the prejudices of the people.

mode lection idered.

I certainly do not intend to enter upon any wholesale denunciation of the system of electing judges. It has been in vogue in most of the states for about forty years, and, except in a few of the largest cities, has not been attended by disastrous results. If it has not fully met the expectations of its friends, it has certainly not justified the evil prophecies of its enemies. I have known excellent judges

who owed their seats to a political caucus and a popular election; I have known men of inferior calibre who owed their appointments to executive favor. If the people occasionally elevate men to the bench who have little to recommend them beyond the ability to pull wires at a caucus, the choice of the executive is sometimes determined by other considerations than the public interest. Upon the whole, except in large cities, the system of election may be said to have worked reasonably well, although I believe the judiciary as a rule stood higher under the old method of appointment. The ideal mode of choosing judges has perhaps yet to be discovered. In my view more depends upon the permanency of the judicial tenure than upon the particular method of selection.

The im
tance o
length
term.

The most ardent advocate of the right of the people to choose their own magistrates would hesitate to submit a fifty thousand dollar lawsuit to a judge who held his seat by annual election, if a strong personal or political friend of the judge were retained against him. If the judge were elected but once in four or six years, of course his hesitation would be correspondingly diminished, but the principle remains the same. The tenure should be during good behavior or for so long a term as to beget in the mind of the judge a habit of independence strong enough to overcome all considerations of fear or friendship. If to this long term be added ineligibility of re-election we have the strongest possible guaranty of independence. In this connection there should always be reserved a provision for the removal of incompetent judges (from whatever cause such incompetence may arise) upon the address of two-thirds of each house of the legislature.

The ju
ciary a
legislat

It is not altogether easy to define the term judicial independence, or to determine what is and what is not an invasion of, or encroachment upon, it. Upon the one hand, we shall all agree that the legislature cannot remove a judge without cause (though it seems it may do this indirectly by abolishing the court), nor reduce his salary, nullify his judgments or set at naught his decisions. Upon the other hand, it will be conceded that it possesses unlimited power to determine the jurisdiction of courts, when and in what

manner suits shall be begun, and to regulate the practice, pleadings and forms and modes of proceeding prior to the trial and, with some exceptions, subsequent to the verdict. It may to a certain extent control the trial itself by fixing the causes for which jurors may be exempted or challenged, prescribing rules of evidence and laying down principles of law which the court is bound to accept and enforce. Manifestly, however, this power is subject to certain limitations suggested by the provision contained in all our constitutions, that the right of trial by jury shall remain inviolate.

relation e judge e jury.

The question, however, which concerns us most directly in this connection is, whether the judge is a constituent part of a jury trial at common law. I have never seen nor heard of a jury trial in which there was not a judge who presided and took a more or less active part, and yet in the ordinary definitions of jury trial given by the lexicographers and elementary writers, he is ignored as completely as if he were a mere supernumerary. Even the judges themselves seem to assume that it is only the jury and the parties to the suit who are entitled to the constitutional protection. The question is one of no little importance. If the judge be the mere spokesman of the law, he is bound to a blind obedience to the will of the legislature in all that concerns the trial; on the other hand, if he be an indispensable and constituent factor in that proceeding known to the law as trial by jury, it is difficult to see why he is not as much entitled to protection against legislative interference in the discharge of his common law duties, as is the jury in the exercise of its proper functions.

tory ctions dicial r.

These remarks are suggested by a series of statutes which have become fashionable in the southern and western states, (for there are fashions in legislation, and even in judicial opinions, as well as in dress) the object of which is apparently to secure the unbiased and unadvised opinion of the jury upon the facts, and an easy and accurate settlement of bills of exceptions, but the effect of which is to shear the judge of his proper magisterial functions and to reduce him to the level of a presiding officer, or the mere mouthpiece of counsel. These statutes are of the following classes:

(1.) Laws prohibiting judges from charging or commenting upon matters of fact.

(2.) Laws requiring all charges to be in writing.

(3.) Laws requiring the judge to give such instructions, and such only, as have been submitted to him by counsel, either with or without modification.

(4.) Laws requiring the court, at the request of counsel, to submit special questions to the jury, to be answered in addition to their general verdict.

193. *The Judiciary as the Guardian of Private Rights* *

The importance of the judiciary as the guardian of fundamental private rights against encroachments on behalf of special interests was fully discussed in the Maryland constitutional convention in 1851, and during the debate one of the delegates made this argument: —

Dange popul trol of judici

Now, sir, paradoxical as it may seem to some, I propose to show that there is at least as much reason for making the judge independent of the people in this country, as there is in England for making him independent of the crown. But at every point we are met with the notion, that the people have all power, and ought therefore to have control over the Judiciary. Sir, if the people have power to do wrong, it is the very purpose of government to restrain its exercise; for the only object which men can propose to themselves, by entering into such an association as civil Society, is to secure to themselves the enjoyment of their rights, and protect themselves against wrong. Are the eternal and immutable laws of justice less imperative, upon men when assembled, in large bodies, than they are when acting individually? Masses are but individuals in combination; and the laws which enjoin the observance of justice, and prohibit violence, or the practice of fraud, are as obligatory in the one case as in the other. Like the Being, from whom they emanate, the Rules of truth and equity are the same to-day, yesterday, and forever. In them "is no variableness, neither shadow of turning." . . .

: judi-
y to pro-
funda-
ıtal
its.

It is obvious, then, in any just view of the matter, that it is our duty to adopt such measures as the faithful execution of the laws requires; and such as will secure to the people their rights of person, of property and of reputation. These are the rights which society and government are instituted to protect, and it is suicidal to maintain for the people, or for the government, a right to destroy or disturb them.

: judici-
to stand
ve con-
ing
rests.

Each portion of the whole has its respective and often diverse interests — in other words, its wants. The mercantile interest may be greater or less than the agricultural, or those who are laborers may be fewer in number than those who are not; yet each has an undoubted claim to the care and protection which his interests require. And so it is with all portions; but it is emphatically the case with the feeble and the destitute, who have smaller means in every respect to protect themselves, and can look nowhere but to the law and its administrators for protection. Now, then, if all this be as I have stated, it is manifest that your laws must be free of access to all, equal to all, and certain for all. To have them administered with a halting, hesitating step — to let them bend one way for this man, another for that, can but encourage, and must sometimes sanction, the doings of the wicked or the passionate or prejudiced, while it will necessarily alarm and discourage and often ruin the victim.

194. *The Method of Selecting Judges* *

Perhaps no ideal method of selecting judges has yet been devised, but the difficulties of reaching a wise conclusion are indicated by the following passages from a debate in the New York constitutional convention of 1846: —

r judges
ıld not
lected.

Mr. Stow. It has been said that the people have already distinctly decided that judges should be elected directly by their votes. I do not consider that this is so; I do not believe the people have said any such thing, and moreover, I think that the people would be very slow to come to this decision; and that they would pause a great while and deliberate long and cautiously before they made

this great change in a fundamental principle of the government. I do not believe any mere majority of the people either by a direct vote or through their representatives should create the judiciary of the State; the minority (for whose benefit this branch is established perhaps more than for any other) should have a decided voice in the matter; they should be heard. And I hope the people will bear in mind the wide and decided distinction between the executive and legislative powers, and the judiciary. A majority elect the legislature and executive; and the reasons for this are very obvious. But a very different mode of selecting the Judges should be adopted. They are as the shield of the minority, to protect from the oppression (if tried) of the majority.

The peo competi to elect.

MR. PATTERSON. I am not, for one, prepared to say that the people of this State are incompetent to elect the judges of their courts. I believe that they are as capable of doing this, as of electing a President or Vice-President of the U.S., or a Governor or Lieutenant-Governor of the State of New York, or any other State. I am opposed to having the judiciary a mere political machine; I want to strip the power of appointing the judges at once and entirely, from the executive; and I will not consent that this power, which has been left in the Governor's hand for 25 years, shall be left there any longer.

Politics appoint ments.

How are these judges appointed at present? The Constitution truly confers that power on the Governor and Senate; but do they exercise it, in reality? Certainly not. The judges of county courts are not thus appointed. Practically, they are appointed by a caucus; and this is held in the county where the judges are to officiate; the people there get together in a caucus; make nominations for the office of judges, and then send these names in to the Governor. Well, who ever knew a Governor to refuse to send in these very names to the Senate, to be confirmed? And when have we had a Senate that refused to confirm these caucus nominations, sent to them thus through the Governor? When one political party has the executive, then their friends follow this

plan, and their men are appointed; and so it is when the other party is in power; they make the caucus nominations, and that is, in reality, an appointment.

political
te on the
vernor.

I remember the case some years ago — in 1834 — (I have told the story to another and smaller body than this, and in this city) — some persons got together, in Franklin county and resolved themselves into a Democratic Republican County Convention. Mr. A. B. was made chairman, and Mr. C. D., Secretary; and after a while it was declared unanimously that Messrs. E. F. and G. H. had a majority of all the votes then present at this great county convention, and they were then unanimously recommended therefore to Governor Marcy for nomination to the Senate. The proceedings came down to him headed, "Proceedings of the Democratic Republican County Convention of Franklin," &c., and so on; and Governor Marcy, seeing the words "Democratic Republican," naturally supposed surely they were all right; that was strong enough recommendation, in all conscience, for him; and so he sent in these two names to the Senate, and they were confirmed. And it turned out afterward, upon inquiry, that they had thus appointed a couple of Whigs, instead of a couple of Democrats. (Much laughter.) And this is a practical illustration of the mode of appointing these judges that has been in operation over 20 years.

ıe English
d Ameri-
n systems
mpared.

Mr. Bascom. The present mode of appointment by the Governor and Senate has received too general popular condemnation and has in my judgment been attended with such results as not to justify its continuance. The judgment and feeling not only in the Convention but throughout the State is against it. The idea is fast being abandoned that any portion of the public servants should enjoy independence of the people whose interests they have in charge, whose business they transact, whose rights they protect or disregard. The idea of the necessity of judicial independence in England is entirely different from that conveyed by the use of the term here. In England, the term means an independence of

the crown, and to preserve it the life tenure of the judges was adopted, while here the advocates of judicial independence are the opponents of judicial responsibility to the people. But we require no such independence here, but rather that mode of selection that shall secure the honest discharge of official duty, by the most direct responsibility.

Appoi judges above politic

We have had appointed judges under the present constitution. How has the system worked? How in your counties, has it been successful in securing the best integrity and ability? Has it even worked well in regard to the judges of your higher tribunals? When was your State more deeply humbled and disgraced, than when the judges of one of your highest courts chaffered on the bench for places of profit within their own power of appointment, when the junior became the chief, when the glitter of small change had greater charms in the eyes of the seniors than the purity of judicial ermine, and they went down to clerks' stools to put lawyers' papers into pigeon holes and keep the dust off them for six cents apiece? These were your appointed judges.

The re for sh terms.

But I have an objection to long terms. I believe as firmly as any one, that in general, this mode of selection would be successful, but it would not always be so. The public ear might be sometimes abused, and incompetent or improper men be placed upon the bench, and I would afford a reasonably frequent opportunity of correcting such mistakes as should be made. Eight or ten years term is proposed by some, but I cannot see the propriety of making the judicial term four or five times as long as the gubernatorial or senatorial term. It would not give the opportunity that ought to be afforded for correcting the mistakes that might be made.

195. *The Jury System*

This eloquent defense of the jury is by Mr. Choate: —

The j and ci trainin

The truth is, however, that the jury system is so fixed as an essential part of our political institutions; it has proved itself to be such an invaluable security for the enjoyment of life, liberty

and property for so many centuries; it is so justly appreciated as the best and perhaps the only known means of admitting the people to a share, and maintaining their wholesome interest, in the administration of justice; it is such an indispensable factor in educating them in their personal and civil rights; it affords such a school and training in the law to the profession itself; and is so embedded in our constitutions which, as I have said, declare that it shall remain forever inviolate, requiring a convention or an amendment to alter it — that there can be no substantial ground for fear that any of us will live to see the people consent to give it up.

e jury in minal es.

For the trial of persons charged with crimes, I do not believe that any material alteration of its character will ever be thought of. It is so much better that ten guilty men should escape than that one innocent man should suffer. In truth, in these days of multiplied statutory crimes and misdemeanors, a large majority of guilty men do escape by not being found out, by not being accused, by not being brought to trial after indictment, and largely, too, by setting aside the verdict by Courts of Appeals, so that our established public policy seems to lean against any harsh or rigid arbitrary application of the criminal laws. By accepting, as we must, the rule that the defendant's guilt must be established beyond all reasonable doubt before he can be convicted, it is hard to see how, as long as three, or two, or one honest man on the jury has a reasonable doubt, the prisoner can justly be deprived of the benefit of it without destroying our cardinal rule. But the insuperable answer to any change so far as criminal trials are concerned, is the question what substitute will you provide — and none has ever been suggested that would command the approval of lawyers or of laymen. . . .

dges as ll as ies af- ted by pular mor.

There is one serious infirmity in trial by jury in criminal cases in times of great excitement, especially when the more boisterous portion of the press undertakes, as it generally does, to prejudice the case and to condemn the accused unheard. The jury, under such circumstances, find it hard to resist the impression of public sentiment so loudly proclaimed. The courage and firmness which

stood as an effectual barrier against the wrath and tyranny of kings, and which won for the petit jury so much of its prestige and glory in English history, are certainly likely at times to fail when confronting the outraged sentiment of that more potent and dangerous despot — an enraged democracy. Fortunately, such tempests of popular fury are very rarely directed against innocence, and other tribunals do not withstand their fury while the storm lasts, any better than the jury. Judges of the first instance, and even the local tribunals of appeal, have been found equally powerless to stem the tide. Study the reports of our own [New York] Court of Appeals in recent years, and you will find more than one instance of public wrath in our great metropolis, fanned into a devouring flame by some lawless newspapers and a somewhat lawless investigating committee, where the trial Court, unconsciously influenced and loudly sustained by public opinion, committed fatal errors against the prisoner, which were confirmed by the local tribunal of appeal, and it was only when the storm had passed and the atmosphere cooled, that the Court of last resort sitting in the remote capital corrected the error, and each time with the unfortunate result that an apparently guilty prisoner, who had been convicted upon illegal evidence or rulings, escaped altogether.

The questi briber

One other charge against trial by jury in criminal cases is the possibility of corruption and bribery of individual jurors. But in my judgment, the common estimate of the extent of this danger is greatly exaggerated. There are but a few well authenticated cases of such crimes in the jury box. I have had little to do with the trial of criminal cases, but in an experience of more than forty years in the trial of civil cases before juries, I cannot recall one case where I had reason to believe that corruption or bribery had reached a single juror. And if you can show me a few authentic cases of such infamy in the jury box, I will undertake to match them with an equal number of similar crimes committed by judges who have been properly exposed and punished. . . .

Let me say what I understand by a jury trial. Well, the first and

ıe judge jury al.

most essential element in a jury trial is a wise, learned, impartial and competent judge — a judge qualified by his character, learning and experience to preside over and control the proceedings, and to advise the jury as to the discharge of their duties. Add to the ordinary modicum of legal learning, courage, honesty and common sense, and you have the kind of a judge I mean. If we say that an adequate supply of such judges, possessed of these ordinary qualities of manhood cannot be found, we libel our own profession, we befoul our own nest wherein they were bred. Of course they cannot be had, if we apply to judicial nominations our favorite democratic idea that one man is as good as another for any office; of course they cannot be had if selected for partisan services; of course they cannot be had if appointed by a boss, or if they are required or allowed to pay for their nominations directly or indirectly; but they can be had if selected on their merits from the gladiators in the same arena, as England has selected her judges since 1688, always with assured success. They must be had, if our institutions are to be preserved.

ıe twelve ın.

And then there are the twelve honest and intelligent jurors drawn from the body of the community, sworn to pass upon the issue, and return whence they came when their task is done. If we say that the average citizen is not equal to the duty, we belie our American manhood, we contradict the whole course of judicial history, and we fail of our duty to the communities of which we form a part, which rely upon us implicitly for the legislative machinery by which juries are to be secured.

ıe advocates.

And then you must have the earnest and loyal advocates, sworn to do their whole duty; which means to employ all their powers and attainments, and to use their utmost skill and eloquence, in exhibiting the merits each of his own side of the case. In doing so, as Mr. Justice Curtis well said, the advocate only does his duty, and if the adversary does his, the administration of justice is secured. I omit not the indispensable presence of the public, an ever essential feature in this great historic forum, for justice, though blind to the parties and to everything but the merits of the case,

must never be secret. It is the sacred possession of the people in whose name and by whose authority it is done. Do you say again that this is an ideal picture? Who of you has not seen it? Who of you does not know that it is not only possible, but can be and ought to be the actual and everyday scene in our Courts?

An attack was made on the jury in the New York constitutional convention in 1894, and it was met by a firm declaration against any innovations by Mr. Root: —

There is popular o position t the jury.

I do not now believe, notwithstanding the very able and forceful addresses which have been made to-night — that the people of the state of New York are dissatisfied with their time-honored institution of trial by jury. I am not dissatisfied with it, sir. I believe that it is one of the most important, most vital, most sacred of the institutions which maintain our free and popular government. I believe that it serves to bring the people — not lawyers and judges, the plain people — who vote, and who underlie the whole structure of our government, into immediate participation in the administration of law. I believe that it mitigates the severe logic of the law, and make its administration tolerable. I believe that it reaches correct results in fact and in reason, though not always by logic; and I believe, sir, that the very essential feature of this system is the requirement of unanimity. I think that the amendment which aims at permitting less than the entire body of the jury to render a verdict is aimed at the very heart of the jury system, and is nothing short of revolution. . . .

The jury popular institutio

I say that this is a most vital matter, because this is where the people are concerned in the administration of the law. It is the muniment of their title to control of that administration. It is the means by which they protect themselves against power, against wealth, and against the judge on the bench. I am not surprised that we should have expressions from judges which tend in derogation of the system of trial by jury, for the system of trial by jury was designed and has served always as a protection against judges, and the time comes often and again when the people need

that protection, when individual liberty needs that protection; and I will never consent, if I vote alone, against overwhelming majorities, to take away one jot or tittle of the strength, stability, and the perpetuity of that safeguard. (Applause.)

Mr. President, I have said all that I have to say, with one exception: We have had read to us to-night a number of expressions of opinion from text-writers, from jurists, from learned judges, in England, in Illinois, in Michigan, in Iowa, and in New York; but in England, in Illinois, in Michigan, in Iowa, in New York, there still remains the system of trial by jury, with its essential characteristic of a unanimous verdict. Theory is against it, Mr. President, but the plain practical common-sense of the Anglo-Saxon race has wrought out and holds to, and I believe means to hold to this, their peculiar method of conciliating disputes and of ending litigation. The plain sense of the people, through hundreds of years in practical experiment, sets itself still against the theories of jurists. The plain sense of the people will have to pass upon this revised and amended Constitution. Not theorists, not jurists, not text-writers. To them we must appeal, and let us apply their good common sense to the work which we do. I hope, Mr. President, that this Convention will not attack the system of trial by jury.

196. *The Law's Delays*

In 1884 the American Bar Association appointed a special committee to inquire into the possibility of reducing the number of delays which occurred in judicial processes, and this committee made a long and interesting report from which only a few extracts can be given here: —

The theory of a lawsuit is, to hear what the parties have to say, and to decide between them. In doing this, the simplest and most direct method is the best. The plaintiff must make his statement; that is the first step; the defendant must make his answer or be held to admit the truth of the complaint; that is the second; if they differ, the truth of the fact must be ascertained;

that is the third; and then the law must be applied, which is the fourth step and the last if there be no appeal. These several steps may be shorter or longer. A short one is the best if it be a sure one. Some side steps may have to be taken, according to the circumstances of particular cases. But in all, not a single unnecessary step should be required or allowed. In other words, no form or proceeding should be permitted which is not necessary to ascertain or preserve the rights of the parties, no form or proceeding that cannot be understood by either party, none that causes needless delay or needless expense. There must, however, be a complaint, and if there be an answer there must be a trial of the fact, a judgment of the law, and an execution of the judgment, with occasional incidental proceedings, such as orders made in the progress of the cause to insure the efficiency of the judgment. In other words, there may be in civil actions these several processes — the complaint, the answer, possibly a reply, the provisional remedies of arrest, replevin, injunction, attachment, receiver or deposit, a trial of the facts in issue, the judgment of the law, the execution of the judgment and one or more appeals, twelve or fourteen distinct processes, most of which are or may become necessary in a severely contested law-suit. The problem is how to expedite them all, preserving at the same time every right of the parties, and to cut off, with an unsparing hand, whatever is not necessary to this design. . . .

Delay getting started.

Let us take our seats as spectators of a severely contested jury trial in a court of general jurisdiction of one of our cities, say in the City of New York, and see how one of them at least is conducted. The hour of the sitting is fixed for eleven o'clock. At that hour a crowd of lawyers, suitors, witnesses, and spectators is in attendance ready for the judge. He comes, perhaps punctually, and perhaps not punctually, but after a few minutes, or a quarter of an hour, or half an hour, nobody can foretell which. At last he appears, and begins by asking what suits are ready, or rather by calling over the calendar, an unintended but real invitation to the parties, one or both of them, not to be ready. This

call, and the little debates which follow, take perhaps another half hour; so that the spectators may think themselves fortunate if they see a suit begun as early as twelve o'clock. It is then brought on and the names of the attending jurymen are called as they are drawn one by one from the wheel. Some questioning generally follows: now and then a contest and a side trial over one or more of the names drawn; but at last a jury is completed.

ıe trial. Then the case is opened by the plaintiff, and the examination of witnesses begins. When three or four questions have been put and answered, some objection is made; it is duly debated for a few minutes, or it may be for an hour, or even for hours; the judge decides the question be allowed or disallowed; an exception is noted, and the questioning starts again. In a short time, however, comes another objection, when the process of debate, decision and exception is repeated, and so on until, perhaps, the day is spent before the first witness is dismissed, and an adjournment to the next day is taken. The next day comes and goes, with the like experience, and so another, and yet another, until at last, the testimony being finished, a discussion is opened upon one or more requests to the judge for his charge to the jury; then follows the charge, the exceptions to the charge come after, and finally the verdict, with perhaps fifty or an hundred exceptions on the record.

ıe appeal. The trial being ended, a re-examination of all the legal questions that arose can generally be had if either party desires it, and one or the other will desire it, if he thinks he can derive advantage from it. The method of re-examination differs in different states; in some the questions are carried directly to another court; in other states they are re-examined in the same court by other judges or possibly by the same judge. The success of whatever method depends upon the ability of the judges; of the trial judge in the first place, and of the re-examining judges in the second. An incompetent judge is an expensive officer. It were better for the state if all the incompetent aspirants for judgeships who beset nominating conventions or executive cham-

bers, were provided for at the public expense in some other way, than that they should be seated upon the bench to harass and bewilder suffering counsel and more suffering suitors.

The j a caus delay.

Whatever may be said in other respects of the institution of the jury for civil cases, it cannot be denied that it is the cause of great delays. This is the effect principally of two causes, one of which is the requirement of unanimity. When the jury is discharged, by reason of disagreement, the case has to be retried. Another and much more considerable cause of delay in the final result, is the ordering of a new trial for misdirection of the court or an erroneous admission or rejection of evidence. This may be obviated to a great extent by requiring the verdict to be special, upon questions submitted by the judge. The result would be that an error of the judge upon the trial would not require a new trial, unless the error related to a finding essential to the judgment; that is, one without which the judgment could not have been rendered.

Costs delays.

Costs, too, have something to do with the delays. Two theories are propounded respecting them; one that they should be made sufficient to cover all the expenses of the successful litigant; the other that they should cover only the fees of the court officers, such as clerks and sheriffs. On one side it is argued that a party who has put his adversary to needless expense and suffered defeat in the suit, ought justly to indemnify this adversary; on the other side it is argued that no system of costs will prevent an unjust claim or an unjust defense, and that in most instances they are instruments of oppression, rather than of justice, and if they are made to depend at all upon the discretion of the judge the discretion is dangerous. The choice between the two depends more upon experience than on theory. And we think experience has shown that to allow no costs, except the fees of the officers, is better than to attempt an indemnification for expenses of the prevailing party.

It appears to us that a great deal of time is wasted and no little uncertainty introduced into the law by the habit of delivering long

opinions at the time of pronouncing judgment. Anyone who will look into the decisions of Lord Mansfield will perceive the difference between the old habit and the new, much to the disparagement of the latter. Our volumes of reports have too many dissertations in the shape of opinions. The inconvenience thence arising is manifold; the time of the judges is wasted; the reports and the cost of the reports are grievously swollen, and worst of all there is the chance, with reverence be it spoken, that some of the dissertations, if their expansion goes on, may be delivered in clouds of verbosity, covering as with a fog the points to sight and steer by.

eference certain ies.

We think, moreover, that giving by statute a preference to certain cases on the calendar is a mistake. The courts may well be trusted for the regulation of their own calendars; when they find a case to be of such public importance as to require a hearing before all others they will be quite sure to hear it. Whenever the state enacts that one case shall be heard before another, which stands ahead of it in order, it confesses its own negligence or inability to provide a prompt hearing for all. . . .

ie estion of peals.

The question of appeal is always a serious one. How many successive appeals should be allowed, and within what time should they be taken? The answer to the first depends upon the organization of the courts. In the State of New York, for instance, where there are upwards of seventy co-ordinate trial courts of the highest original jurisdiction, it would be out of the question to give an appeal from each of them to the Court of Appeals; there must, of necessity, be a previous sifting of the case by a proceeding in the nature of an appeal in the original court itself; that is, an appeal from one judge to two or three co-ordinate judges. In other states the same reasoning may not apply, and one appeal may suffice. The time allowed for an appeal should be short. It is now in many instances long, grievously long indeed; a year, two years, sometimes six or seven.

197. *Corruption in the Administration of the Criminal Law* *

In the following testimony by Police Captain Max L. Schmittberger before the Lexow investigating committee in New York in 1894, the methods which a corrupt police force may employ to make private gains are fully described: —

A confidential wardman selected.

Q. While you were in command of that precinct, we want to understand the condition of affairs in that precinct, who was your wardman? *A.* When I came there Campbell and Martin were the detectives.

Q. Did you then have a man appointed with whom you held confidential relations? *A.* Yes, sir.

Q. Now, did you appoint Gannon from that squad or from that precinct, or did you have him taken from another precinct? *A.* I had him transferred and brought there.

Q. And he was recognized as the captain's confidential man? *A.* Yes, sir.

Q. And whose principal duty was it to make what are known as the collections in the several precincts to the captain? *A.* Yes, sir.

Q. When you had Gannon transferred, did you have a conversation with him relating to what collections might be made in that precinct? *A.* Yes, sir.

Collections from policy shops.

Q. And what lines were laid out, what fields were indicated, where collections could be made? *A.* There was nothing there only policy shops.

Q. About these policy shops, did you ascertain the number? *A.* Yes, sir.

Q. How many were in that precinct at that time, do you remember? *A.* About ten, I guess.

Q. And how much did you determine that they should pay? *A.* Twenty dollars a month each.

Q. Was that the established custom? *A.* Yes, sir.

Q. Give us your first knowledge of that custom, how it became known to you the policy shops were to pay $20 a month.

A. The policy shops all there in the precinct and in the upper part of the city are under a man by the name of Parker, and if I remember right, Parker came to the station-house and saw me, and told me how many shops he had in the precinct; that was all; and he was introduced to Gannon, and Gannon did the rest.

Collections from liquor dealers.

Q. Were there any other sources of collecting except the policy shops in that precinct? *A.* There was the liquor dealers' organization there, Bohemian Liquor Dealers' organization; they contributed about $80 a month, I think.

Q. Now, of the money that was paid by the policy shops and of the money that was paid by the Bohemian Liquor Dealers' association, how much did you receive? *A.* Well, all but 20 per cent.

Q. That was the recognized thing in all the precincts? *A.* I guess so

Q. So far as you know? *A.* Yes, sir.

Q. About what was the sum that you collected there every month, after paying Gannon his 20 per cent; there were 10 policy shops, that would be $200? *A.* Yes.

Q. Then there was $80 from the Bohemian Liquor Dealers' association? *A.* Take 20 per cent off that.

The spoils shared with higher officers.

Q. Now, while you were captain of that precinct and in receipt of that money every month, did you give any part of that money or of any money to any other police official? *A.* I did.

Q. You did? *A.* Yes, sir.

Q. To whom did you give it? *A.* Inspector Williams.

Q. To Inspector Williams; was Williams the inspector of that inspection district? *A.* Yes, sir.

Q. That precinct was within his jurisdiction as inspector? *A.* Yes, sir.

Q. Will you please tell us how it was first arranged between Williams and yourself that you should give him a portion of the money collected by you in that precinct? *A.* I succeeded Captain Gunner, who had been retired; the first day I went to the station-house Captain Gunner came in to get some things belonging to

himself in the office; Captain Gunner and I had a confidential talk as to how much he had given to the inspector.

Q. Just tell us the talk, if you please, captain. *A.* I asked Captain Gunner how much did you give to the inspector; because I don't want to give any less than you have given, and Captain Gunner told me what he had given.

Q. What did he say; how much? *A.* He said he sent $50, sometimes $75, just as he felt; between $50 and $75 a month to the inspector. He told me that he had put this money in an envelope and given it to Campbell, that Campbell had given it to Sergeant Price in Inspector Williams' office.

How the money w delivered

Q. Sergeant Price who is now captain? *A.* Yes, sir; I know him; Williams didn't think that I needed any intermediate person; I went directly to him and handed him the money.

Q. How much did you hand him, captain? *A.* Fifty dollars.

Q. Did you say anything to him when you handed it to him? *A.* No, sir.

Q. Did he say anything to you? *A.* No, sir.

Q. Placed it in an envelope? *A.* Yes, sir.

Q. And handed it to him without a word? *A.* Yes, sir.

Q. In his office at headquarters? *A.* In his office at headquarters.

Why the money w shared.

Q. Now, captain, we want to have you place upon the record here why you gave part of the money collected by you to Williams as the inspector. *A.* Well, it was in Williams' power to send men up there to raid those policy shops over my head; to prevent him from doing that; of course, upon consideration of receiving that sum of money every month he wouldn't do it.

Q. So that in order to enable you to derive the profit or advantage from these policy shops doing business in that precinct you divided the proceeds with your superior officer, the inspector? *A.* Yes, sir.

Q. Now we have it, that this money was paid to him in consideration that he would allow you to permit these policy shops to continue in their business in violation of law? *A.* Yes, sir.

e pay-
nts made
bills.

Q. This you know, that you gave to Williams every month a part of the identical money that was contributed by these policy shops and liquor dealers? *A.* Yes, sir.

Q. You didn't change the money? *A.* Yes, sir.

Q. Was it an understood thing in the department that the money should go in bills wherever money was to be paid in the manner that you have prescribed? *A.* Oh, yes.

Q. In bills? *A.* Yes.

Q. So as to leave no trace? *A.* Yes, sir.

lations
the law.

Q. Speaking of the Bohemian liquor dealers, is it a fact that the money they paid was paid in consideration of their being allowed to sell on Sundays? *A.* Yes, sir.

Q. When you went to Eighty-eighth Street, what collections were made in that precinct? *A.* There was some policy shops there and some pool-rooms; that was all.

Q. How much did they pay? *A.* Well, altogether about $900 a month; about $800 a month.

Q. Could you give us the number of policy shops, because we want to be as exact as we can; can you give us the number of policy shops and the number of pool-rooms that were in that precinct? *A.* I think there were about 10 policy shops and three pool-rooms.

Q. Can you tell us how much these pool-rooms pay? *A.* Two hundred dollars a month.

e liquor
lers and
mmany.

Q. How about the liquor dealers? *A.* Didn't touch them.

Q. Was it not an understood thing then that the liquor dealers had made their peace with the police through Tammany Hall? *A.* Yes, sir.

Q. And that instead of paying directly to the police they should pay Tammany Hall; was not that the understood thing? *A.* Well, that was the understood — I don't know whether that was really so or not, that is what I heard.

Q. That is your reason for your non-interference? *A.* Yes, sir.

CHAPTER XXVII

THE ORGANIZATION OF MUNICIPAL GOVERNMENT

198. *Home Rule for Cities*

THE constant interference of the state legislature in municipal affairs has been accompanied by many palpable evils and has led to a demand on the part of some reformers for "municipal home rule" — a condition more easily advocated in the abstract than defined in the concrete. In the last constitutional convention of New York Mr. Root made an argument against allowing cities too great an independence from central control: —

Cities and state-wide social and economic unity.

I entered the chamber while that gentleman was referring to the free cities of the middle ages, and I listened with great interest and satisfaction to the remarks which he made upon that subject and those which followed. . . . But, sir, let me ask the gentleman if, filled with natural and proper pride in the great city which he represents, he has not taken a somewhat one-sided view of the relations of municipalities of the State to the State? The free cities of the middle ages stood by themselves, governed by themselves, but they undertook to exercise no power of governmental rights over others, and acknowledged no duties to others. The great cities of the State of New York can build no walls around their borders. They seclude themselves in the midst of no barriers between themselves and their fellow-citizens of the State. They undertake to furnish to us, and acknowledge their obligations under the law to all of us from Montauk to the State line in Lake Erie, the great market, the great centre of education, of recreation, of business, the centre commercially, financially, politically, around which revolve, and from which throb and pulse the life currents of a State which is a political, social, commercial and financial unit.

Cities and State and National Politics.

Now, sir, the city which the gentleman represents undertakes to cast votes which will determine who shall be the presidential electors of the State of New York, to cast votes which shall determine who shall be the Governor of the State of New York, to send representatives to the Senate and Assembly, whose votes will outweigh those of any less number from any other part of the State of New York, in determining the policy and the law for the whole State. That city cannot cut herself off from the rest of the State. That city cannot put herself in the position of a free city of the middle ages with a wall around her, governing herself exclusively; or if she does, she secedes from the State and becomes a city by herself. And against that or any amendment or law which provides for that, I rise now to protest. No, sir. The cities of the State, while properly claiming that they should be exempted from undue interference with their private affairs, nevertheless must admit the right of the people of a State to which they belong and to which they owe allegiance, equally with the smallest hamlet, to see that the great bureau of police in which every citizen is interested, that the exercise of the elective franchise in which every citizen is interested remain under the domination of the law of the State. One is correlative to the other. The two must go hand in hand, and I understand, sir, that the attempt of this committee has been to put into the measure which they have reported, on the one hand, a just exemption from undue interference in purely private and local matters in the city, and on the other hand, the assertion and the protection of the higher right of the people of the great State of New York to preserve her autonomy, her political independence, her political unity and the rights of all her people by control over those governmental functions in the city, which are the proper province of the general government. . . .

199. *Popular Charter Drafting*

California, in common with some other states, has attempted to solve the vexed question of municipal home rule by establish-

ing in the constitution of the state these provisions authorizing cities which have over a certain population to formulate their own system of government: —

How the charter is drafted.

Sec. 8. Any city containing a population of more than three thousand five hundred inhabitants may frame a charter for its own government, consistent with and subject to the Constitution [or re-frame a charter], by causing a board of fifteen freeholders, who shall have been for at least five years qualified electors thereof, to be elected by the qualified voters of the said city, at any general or special election, whose duty it shall be, within ninety days after such election, to prepare and propose a charter for such city, which shall be signed in duplicate by the members of such board, or a majority of them, and returned, one copy to the Mayor thereof, or other chief executive officer of such city, and the other to the Recorder of the county.

Publication and ratification.

Such proposed charter shall then be published in two daily newspapers of general circulation in such city, for at least twenty days and the first publication shall be made within twenty days after the completion of the charter; *provided*, that in cities containing a population of not more than ten thousand inhabitants such proposed charter shall be published in one such daily newspaper; and within not less than thirty days after such publication it shall be submitted to the qualified electors of said city at a general or special election and if a majority of such qualified electors voting thereon shall ratify the same, it shall thereafter be submitted to the Legislature for its approval or rejection as a whole, without power of alteration or amendment. Such approval may be made by concurrent resolution, and if approved by a majority vote of the members elected to each house it shall become the charter of such city, or if such city be consolidated with a county, then of such city and county, and shall become the organic law thereof, and supersede any existing charter, . . . all amendments thereof, and all laws inconsistent with such charter. A copy of such charter, certified by the Mayor or chief executive officer, and authenticated by the seal of such city, setting forth the submission of such charter to the

electors, and its ratification by them, shall, after the approval of such charter by the Legislature, be made in duplicate, and deposited, one in the office of the Secretary of State, and the other, after being recorded in said Recorder's office, shall be deposited in the archives of the city, and thereafter all courts shall take judicial notice of said charter.

Amendment of the charter.

The charter, so ratified, may be amended, at intervals of not less than two years, by proposals therefor, submitted by the legislative authority of the city to the qualified electors thereof, at a general or special election, held at least forty days after the publication of such proposals for twenty days in a daily newspaper of general circulation in such city, and ratified by a majority of the electors voting thereon, and approved by the Legislature as herein provided for the approval of the charter. Whenever fifteen per cent. of the qualified voters of the city shall petition the legislative authority thereof to submit any proposed amendment or amendments to said charter to the qualified voters thereof for approval, the legislative authority thereof must submit the same. In submitting any such charter, or amendments thereto, any alternative article or proposition may be presented for the choice of the voters, and may be voted on separately without prejudice to others.

200. *The New York Check on the Legislature*

New York has sought to find the middle ground between local autonomy and state centralization by the following constitutional provision: —

Classes of cities.

All cities are classified according to the latest state enumeration, as from time to time made, as follows: The first class includes all cities having a population of one hundred and seventy-five thousand or more; the second class, all cities having a population of fifty thousand and less than one hundred and seventy-five thousand; the third class, all other cities.

Special city laws.

Laws relating to the property, affairs of government of cities, and the several departments thereof, are divided into general and

special city laws; general city laws are those which relate to all the cities of one or more classes; special city laws are those which relate to a single city, or to less than all the cities of a class. Special city laws shall not be passed except in conformity with the provisions of this section. After any bill for a special city law, relating to a city, has been passed by both branches of the Legislature, the house in which it originated shall immediately transmit a certified copy thereof to the mayor of such city, and within fifteen days thereafter the mayor shall return such bill to the house from which it was sent, or if the session of the Legislature at which such bill was passed has terminated, to the Governor, with the mayor's certificate thereon, stating whether the city has or has not accepted the same.

Public hearings and action on bills.

In every city of the first class, the mayor, and in every other city, the mayor and the legislative body thereof concurrently, shall act for such city as to such bill; but the Legislature may provide for the concurrence of the legislative body in cities of the first class. The Legislature shall provide for a public notice and opportunity for a public hearing concerning any such bill in every city to which it relates, before action thereon. Such a bill, if it relates to more than one city, shall be transmitted to the mayor of each city to which it relates, and shall not be deemed accepted unless accepted as herein provided, by every such city. Whenever any such bill is accepted as herein provided, it shall be subject as are other bills, to the action of the Governor. Whenever, during the session at which it was passed, any such bill is returned without the acceptance of the city or cities to which it relates, or within such fifteen days is not returned, it may nevertheless again be passed by both branches of the legislature, and it shall then be subject as are other bills, to the action of the Governor. In every special city law which has been accepted by the city or cities to which it relates, the title shall be followed by the words "accepted by the city," or "cities," as the case may be; in every such law which is passed without such acceptance, by the words "passed without the acceptance of the city," or "cities," as the case may be.

201. *The Leading Difficulties in City Government*

A committee appointed by the New York legislature in 1890 to investigate the conditions and problems of modern city government came to the conclusion that the following were the chief difficulties underlying the question of city government in that state: —

Our investigations result in the conclusions that the chief difficulties which underlie the government of cities in this State are fourfold.

Overlegislation.

First. Overlegislation and too frequent yielding on the part of the Legislature to the importunities of representatives of the various cities for the passage of special or local bills. In our opinion the Constitution should be amended so as to protect cities against the power of individuals to appeal to the Legislature, and to protect the Legislature from the necessity of entertaining such appeals by restricting its power to legislation by general laws.

Larger powers to localities.

Second. The absence of a general law for the government of all cities in the State, whereby larger powers should be granted to local authorities and the Legislature correspondingly relieved.

Absence of full information on city administration.

Third. The absence of a complete and accurate information relative to municipal administration, and as incident to this, the necessity for the enactment of a law which shall require a series of systematic annual reports to be filed by each municipality with some proper State officer, setting out with sufficient fulness and detail the classes of administrative and financial facts which we refer to hereafter, in order that the Legislature and the people may be enabled to advise themselves fully, and at all times, with regard to the general condition of the government of cities, so far as the same can be made apparent by means of an accurate and systematic publication of reports showing the indebtedness, taxation and expenditure of such cities.

Fourth. The subordination of city business to the exigencies of State and national politics. . . .

Under the existing system, stability of city government is a

practical impossibility. The officers of our municipalities find it impossible to determine upon any general policy whatever looking towards better administration with the expectation that any such policy can ever be carried out to its proper and logical conclusion. This is due not only to the continued possibility of legislative interference, but because of the pertinacity with which interested parties or local authorities appeal to the Legislature year after year in matters affecting city government — from the most important to the most insignificant — thus depriving the cities of their administrative autonomy, and subjecting them to conditions which do not prevail in the administration of the business of any other corporation whatever. For this the people are themselves very largely to blame, because of their indifference to the policy of their local authorities and their failure to protect both themselves and the Legislature by a knowledge and disclosure of the facts. These are conditions which, if applied to the business of any other corporation, would make the maintenance of a continued policy and a successful administration as impossible as they are to-day in the government of our municipalities, and produce waste and mismanagement such as is now the distinguishing feature of municipal business as compared with that of private corporations. The situation then is as follows: —

Constant changing of laws relating to cities.

That it is frequently impossible for the Legislature, the municipal officers, or even for the courts to tell what the laws mean. That it is usually impossible for the Legislature to tell what the probable effect of any alleged reform in the laws is likely to be. That it is impossible for anyone, either in private life or in public office, to tell what the exact business condition of any city is, and that municipal government is a mystery even to the experienced. That municipal officers have no certainty as to their tenure of office. That municipal officers can escape responsibility for their acts or failures by securing amendments to the law. That municipal officers can escape real responsibility to the public because of the unintelligibility of the laws, and the insufficient publicity of the facts relative to municipal government. That local authorities

Confusion and uncertainty in the laws.

receive permission to increase the municipal debt for the performance of public works which should be paid out of taxes. That the conflict of authority is sometimes so great as to result in a complete or partial paralysis of the service. That our cities have no real local autonomy. That local self-government is a misnomer; and that consequently so little interest is felt in matters of local business that in almost every city in the state it has fallen into the hands of professional politicians. . . .

Confusion in municipal finances.

We have found great difficulty in arriving at the facts concerning what, on its face, should appear under any circumstances to be a simple matter and one easy of discovery, namely, the exact cost per annum of the government of each of the cities; the extent to which each of the cities has used its credit; the extent to which it uses its taxing power; the amount of the expenditure from moneys derived from loans; the amount of the expenditure from moneys derived from taxation; the existence or non-existence of a sinking fund; the operations of the sinking fund; the kinds and classes of taxes or licenses or other sources of revenue to the city; the rights, franchises and property of the city; the amount of indebtedness of the city, permanent or floating, and the extent to which the credit of the city is used for temporary purposes in anticipation of the collection of taxes or other revenues.

The importance of municipal finance.

The entire expenditure of this State for State purposes is only about one-fifth the expenditure from the taxation sum spent by city governments for purposes of local administration. Although the expenditure of municipalities for the purpose of government vastly exceeds the expenditure of the State, the actual cost of performing the several municipal services, and the condition of municipal finance generally, are practically unknown and extremely difficult for the Legislature or the people to discover.

Confusion in the system of accounting.

The system of accounting in the several cities is more unintelligible and chaotic even than the laws under which the cities themselves are administered. The chaos in the accounts may be, and in our opinion must be, credited in the first instance to the chaos in the laws. How and why this is will be shown more fully in the

detailed consideration of the reports of the several cities on their financial administration. We believe that there can be no wise legislation with reference to the government of cities, unless it be possible for the officers of this State — and especially for the Legislature and the Governor — to be able at all times to know with definiteness and certainty the facts relative to the general condition of municipal administration in each of the cities and more particularly to the exact financial situation of each and all of them.

202. *Decentralized Municipal Administration*

This extract from the address of Mayor Hart to the Boston Municipal Council in 1891 describes the system of city administration commonly adopted when cities first began their remarkable growth in America. It has been by no means entirely abandoned to-day, but it is giving way everywhere before the demand for a more centralized and responsible form of government.

Diffusion of executive power.

I renew my recommendation for the consolidation of certain Executive Departments for the benefit of the public and the public service. The number of separate Departments directly controlled by the Mayor of the City is thirty-nine, with ninety-two separate heads, not including more than a hundred sub-heads or assistants subject to the Mayor's confirmation, and excluding, also, more than twenty-five hundred Executive appointments, made annually subject to confirmation in the Board of Aldermen. If the Mayor wishes to make his appointments from actual knowledge, sufficient time will not be left for administrative work and for the necessary inspection of the thirty-nine separate Departments under his control, not to mention the half-dozen independent Departments and special boards subject only to his general supervision. If the Mayor cannot readily keep familiar with the Departments, how can the plain citizen who comes to City Hall to transact business? The President of the United States has eight Cabinet officers, the Mayor of Boston has ninety-two.

We need a Board of Public Works forthwith, and other con-

Divided responsibility in commissions.

solidations in time. There is no valid reason why the five Ferry Commissioners, established by Ordinance, should not be replaced by one Superintendent, to be appointed by the Mayor subject to confirmation in the Board of Aldermen. Mt. Hope Cemetery should be placed under similar control. I think one Record Commissioner sufficient. The Fire Department, the Law Department, the Park Department, the Public Institutions, and the entire Water Department should have one well-paid head each, three-headed commissions tending to divide responsibility, and to give a less energetic and harmonious service than the public requires. The office of Fire Marshal, established by the Commonwealth, should be abolished, and its duties transferred to the Fire Department. In the Records, Fire, and Law Departments the simplification can be established by Ordinance. Constables should be appointed by the Board of Police. All weighers and measurers should be attached to the Department of Weights and Measures.

Heads of departments should be appointed.

Heads of Departments should be appointed during good behavior, and all subordinates, save in a few cases, should come under the civil-service regulations of the Commonwealth, partly to abolish favoritism, that curse of government, partly to save time usually wasted when places in the public service are filled upon the request of interested persons. Officers appointed by the Mayor and confirmed by the Board of Aldermen, unless in charge of a Department established by Ordinance, should be appointed for one year only. At present Constables, Weighers of Coal, and other minor officers serve until removed, or until others are appointed in their respective places.

Annual elections condemned.

I think our present system of annually electing the entire City Government little less than barbarous. There is no sound reason why Mayors should not be elected for terms of two or three years, and why the members of the City Council should not be chosen for like terms, one-half or one-third to be voted for annually. In that way the City Council would become a perpetual body, and the annual elections would no longer give so unfortunate a shock to the public service and the interests of the City. Annual elections

as now held are neither instructive nor useful. Longer terms of elective officers are conservative and will place upon voters a greater duty.

203. *The Mayor's Power in New York City*

These sections of the New York charter, giving some of the principal powers conferred on the mayor, illustrate a leading tendency in American city government and show how that great metropolis has sought to concentrate authority and fix responsibility: —

The executive power of The City of New York, as constituted by this act, shall be vested in the mayor, the presidents of the several boroughs and the officers of the several departments. The mayor shall be the chief executive officer of the city; he shall be elected at the general election in the year nineteen hundred and five, and every four years thereafter, and shall hold his office for the term of four years commencing on the first day of January after his election. The salary of the mayor shall be fifteen thousand dollars a year. . . . *The executive power of the city.*

The mayor may, whenever in his judgment the public interests shall so require, remove from office any public officer holding office by appointment from a mayor of the City of New York, except members of the board of education, and aqueduct commissioners, trustees of the College of the City of New York, and trustees of Bellevue and allied hospitals, and except also judicial officers for whose removal other provision is made by the constitution. No public officer shall hold his office for any specific term, except as in this act is otherwise expressly provided. . . . *The mayor's removal power.*

It shall be the duty of the mayor: *The mayor's duties.*

1. To communicate to the board of aldermen, at least once in each year, a general statement of the finances, government, and improvements of the city.

2. To recommend to the board of aldermen all such measures as he shall deem expedient.

3. To keep himself informed of the doings of the several departments.

4. To be vigilant and active in causing the ordinances of the city, and laws of the state to be executed and enforced, and for that purpose he may call together for consultation and co-operation any or all of the heads of departments.

5. And generally to perform all such duties as may be prescribed for him by this act, the city ordinances and the laws of the state. . . .

The mayor's appointing power.

The mayor shall appoint the heads of departments and all commissioners, except as otherwise provided in this act. He shall also appoint all members of any board or commission authorized to superintend the erection or repair of any building belonging to or to be paid for by the city, whether named in any law or appointed by any local authority, and also a commissioner of jurors for the boroughs of Manhattan and the Bronx, inspectors of weights and measures, and as many sealers of weights and measures as may by ordinance be prescribed, and also the members of any other local board and all officers not elected by the people, whose appointment is not excepted or otherwise provided for. Every head of department and person in this section named shall, subject to the power of removal herein provided, hold his office for such term as is provided by this act, or otherwise, and in each case until a person is duly appointed, and has qualified, in his place.

The commissioners of accounts.

The mayor shall appoint and remove at pleasure two persons who shall be commissioners of accounts, one of whom shall be a certified public accountant. It shall be their duty, once in three months, to make an examination of the receipts and disbursements in the offices of the comptroller and chamberlain, in connection with those of all the departments and officers making returns thereto, and report to the mayor a detailed and classified statement of the financial condition of the city as shown by such examinations. They shall also make such special examinations of the accounts and methods of the departments and offices of the city and of the counties of New York, Richmond, Queens and Kings, as the mayor from time to time may direct, and such other examinations as the said commissioners may deem for the best

interests of the city, and report to the mayor and the board of aldermen the results thereof. For the purpose of ascertaining facts in connection with these examinations they shall have full power to compel the attendance of witnesses, to administer oaths, and to examine such persons as they may deem necessary. Such commissioners shall each be paid the sum of five thousand dollars a year. The board of estimate and apportionment and the board of aldermen shall annually appropriate a sum sufficient to pay the salaries of said commissioners, and in the discretion of said board and the board of aldermen a sum sufficient to enable them to employ the necessary assistance to carry out the provisions of this section.

The mayor may be removed from office by the governor in the same manner as sheriffs, except that the governor may direct the inquiry provided by law to be conducted by the attorney-general; and after the charges have been received by the governor, he may, pending the investigation, suspend the mayor for a period not exceeding thirty days.

The remov of the mayor.

204. *The Council and Municipal Administration* *

In January, 1909, the Boston Finance Commission, charged with the investigation of the conditions of government in that city, made a special report to the mayor and city council from which a few passages are given here: —

The possession of concurrent power over appropriations and loans aggregating $25,000,000 a year and over the municipal ordinances for a population of 600,000 people would seem to furnish sufficient honor to make a seat in the city council an object of legitimate ambition, and to cause whatever sacrifice of time may be involved to be looked upon as a civic duty. Membership in the city council, however, is quite generally regarded as a discredit rather than an honor; and it is difficult to induce representative men to become candidates for either branch.

Membersh in the city council a discredit.

The reason is not that the work and responsibilities of the city

ıe reasons the credit.

council were so diminished by the charter of 1885 as to destroy its importance. The prohibition of interference with the letting of contracts, the employment of labor and the other details of administration, was intended as much for the relief of honest members of the city council as for protection against dishonest ones. It is only through this withdrawal of executive functions that membership in the city council is possible for busy men. The reasons for the disrepute into which the city council has fallen and for the consequent disinclination of competent and representative citizens to serve in it, are to be found in the conduct of that body and its members.

ıe council s an interest only the spoils office.

The city council as a body gives no serious consideration to its duties. In 1907 twenty-eight of the forty-two joint standing committees had no papers referred to them, and held no meetings. In the common council of the year four hundred and seventy orders were introduced and referred to the mayor without discussion or vote. Its work on the annual appropriations bill consists generally of attempting to raise the mayor's estimates to the maximum amount allowed by law, with a preference for those departments where the patronage is largest. Loan bills are log-rolled through with more regard for the demands of interested constituents and the possibility of jobs than for the needs of the city as a whole. The annual borrowing capacity of the city within the debt limit is treated as affording so much more money to be spent; and every occasion is seized to petition the legislature for leave to borrow additional millions outside the debt limit. This phrase, the "debt limit," has lost its meaning, and each additional authorization to borrow in excess of it is regarded as a "gift" of money by the state to be spent as soon as the act can be accepted. Notwithstanding the small amount of legitimate business transacted, weekly meetings of both branches are held throughout the year, except in summer, and a small army of high-salaried clerks, stenographers, messengers and assistants is maintained. At least $50,000 a year is wasted upon superfluous employees, generally politicians, retained to aid the city council in the non-discharge of its duties.

Many members spend their time in violating the charter by besieging the heads of departments to employ men, raise salaries, give out contracts, and order goods for the benefit of their political supporters and constituents. If persistent entreaties are insufficient to cause the heads of departments to swerve from their duty, recourse is often had to scurrilous attacks on the floor of the city council which are printed in the daily papers and perpetuated in the official publications of the city. These illegal efforts are often directed to the pecuniary benefit of the members themselves. In the belief that they could not contract directly with the city, the practice has arisen of making contracts and selling goods under assumed names, or as silent partners with contractors or material men. Illegal practices.

Few large cities in the country have a double legislative body. In 1908 eleven cities in this state had a single legislative body; and the mayors of all these cities informed the commission that there was no disposition to return to the double chamber system. During the present year two more cities have come under the single chamber system. The chief objections to the double chamber are the multiplicity of elective officers, the diffusion of responsibility, and the fact that the members of one of the branches must be elected by wards and do not represent the city as a whole. Moreover, there is no true analogy between the legislative department of a city government and our state and national legislatures. In fact, the word "legislative," when applied to a city council, is a misnomer It is a convenient expression to distinguish that body from the executive, but it does not represent in any accurate sense the functions of a city council. These relate mainly to the appropriation of money for local purposes, and involve very few questions of the kind passed on by a true legislative body. The reason for having two branches of a state legislature does not, therefore, apply to a city council. The relations between a mayor and city council are analogous to those which exist in private corporations between the president and the board of directors. The double chamber system.

The sole advantage to be found in the double chamber system

The advantage of two chambers.

is that the mistakes of one body may be corrected by the other. Not infrequently in the history of our city government an unwise exercise of the borrowing power by one branch has been negatived by the other; but much more frequently improvident loans desired by one branch have been added to the similar loans favored by the other, incorporated in a single bill, and passed. In fact, this has become the common way in which the loan bills are made up. On the whole, the disadvantages of a second chamber appear to the commission to far outweigh its advantages.

The mayor as a check on the council.

If there be but one elective council, there should be a check upon its action more effective than the qualified veto power now possessed by the mayor. Such a check can be secured by enlarging the power of the mayor over appropriations, loans, franchises and ordinances. The commission recommends that the mayor be given a concurrent voice in all matters passed on by the city council. This means either an absolute veto or the right of initiative on his part. The commission recommends a combination of the two plans. The annual appropriation bill or budget should originate with the mayor in legal theory as it does now in practice, while all other acts and votes of the city council should be subject to his approval. Appropriations from revenue and taxes should be submitted by the mayor to the city council which should have the power to eliminate or decrease items but not to increase or add items. A similar provision, but varying in details, is found in the charters of New York, Baltimore and Cleveland and is recommended by the National Municipal League for general adoption by cities of the country. All other acts, votes, orders, and resolutions of the city council should require the affirmative approval of the mayor.

Reduce the number of councilors.

If the city council is to be elected at large, the commission regards it as essential that its membership should be small. The history of municipal government in this country has demonstrated that the elective offices should be few in number. By reducing the number of candidates and thereby simplifying the ballot, good nominations and intelligent discussion of candidates will be pos-

sible. This is not now the case. The commission recommends a city council of nine members, elected at large, three each year after the first, for a term of three years.

A finance commission.

A permanent body with powers and duties similar to those of the present finance commission is a vital necessity. Without it the people have no impartial means of accurate information as to the manner in which the mayor, the city council, and the heads of departments are conducting the business of the city. The ignorance of the voters upon these subjects has been a great hindrance to good government in this city. Adequate means of enlightenment through investigation and publicity cannot be secured through the efforts of volunteers; though these may be of great value. An official board of information, acting diligently, fairly, and continuously, is required. The commission, therefore, recommends the appointment by the governor of a board consisting of five members, with authority to draw against the city treasury a sum not exceeding $25,000 per annum for the expenses which it may incur in the performance of its duties.

Duties of the commission.

These duties should be to investigate such departments, methods, and practices as may from time to time be thought to require investigation, to hold public hearings if necessary, and to report from time to time either to the city government or to the legislature. The commission should have the same powers with respect to the summoning of witnesses and the production of papers as were given to the finance commission by chapter 362 of the Acts of 1908. Experts should be retained to investigate the more complicated questions of administration.

A summary of reforms.

The legislative measures which the commission regards as essential to enable the people of Boston to redeem their government may be summarized as follows:

1. A simplified ballot, with as few names thereon as possible.

2. The abolition of party nominations.

3. A city council consisting of a single small body elected at large.

4. The concentration of executive power and responsibility in the mayor.

5. The administration of the departments by trained experts, or persons with special qualifications for the office.

6. Full publicity secured through a permanent finance commission.

205. *A Plea for the Rehabilitation of the City Council*

The experience of American cities with corrúpt and irresponsible boards of aldermen and councils has led to a drastic reduction in the general powers of the municipal legislature. This development has not been without protest, however, and in the last New York constitutional convention, Mr. Jenks made a plea for the rehabilitation of the city council: —

There are too few direct taxpayers.

The difficulties in the government of cities are not far to seek. I tell nothing new. I may be unconsciously plagiarizing. They are these: First. There are so few direct taxpayers. You may take almost anything from a man indirectly, little from a man directly. The man who pays the rent does not understand that the tax levy bears upon him. The man who pays the direct tax into the receiving office is he who protests. The other is indifferent; he is the workingman, the rent payer, who sees no tax bill and forgets that any burden is upon him. It is chiefly on account of the fewness of the direct taxpayers that the difficulties in the government of cities exist.

The government is too complex.

Another difficulty is that the affairs of the city are not understood by the intelligent citizens who live in them. We have a complex system of city government; we have boards and bureaus; we have commissions and routine of delicate charter provisions and manipulations. No man, unless he becomes a student of his own municipality, burning the midnight oil, can understand the system and program of government. Take these two things, then, the intricate method of administering government in cities, the fewness of the people compared with the population who pay direct taxes, and you have the chief bars to good clean government.

The taxpayer is hopeless.

A man goes about his business in despair, and says: "Those fellows in the city hall or common council can manage it. I pay my taxes. They are unjust, but I do not know the remedy, nor where lies the fault. The system is wrong, but who is the man?" How many men know the manner in which their own city is governed? They may hear of the board of works, or of the common council, but who can put his finger on any provision of the city government and say this or that is the provision that should be changed or this or that is the provision which should be remedied or amended, or here is he who must account? Now, if we cannot have the town meeting or the folk mote, we need so far as is possible true representative government; we need a system so simple that the man when he comes to the voting booth can know exactly what he is doing and his full measure of responsibility. We want to have simplicity and responsibility coupled with unity in the administration of the affairs of the city; and then it seems to me we have in our imperfect way, at least, partial solving of the problem. . . .

The city council.

Then, gentlemen, let the common council consist of, say 120 men, in cities of the first class, and in cities of the second class of seventy-five, and in cities of the third and final class, of thirty. It may be wise, it may be well, that in the great city of New York there should be a system of dual chambers. It may be wise, it may be well, that there should be a smaller Senate-like body, if you please, elected by the citizens at large, but the gentleman's experience and mine go hand in hand when we say that one general ticket, elected by the whole city, does not show such improvement, in either ability or honesty or statesmanship, as to commend itself either to him or to me.

Larger powers should be given to the council.

The chief election officers of the city should be required to divide the various cities into districts of compact territory and of relative equality of population, as near as may be, and from each district there should be elected for a term equal to that of the mayor a representative to the common council. I believe there should be the divorce of municipal elections from State and national elec-

tions. I believe, sir, that full power should be intrusted to this common council by general laws, not even such emasculated powers as are given in this proposed article, but it should be intrusted with every power of local government and with every governmental power committed to the city by the State. That is, I believe it should have the power of fixing the appropriations; I believe it should have the power of determining the tax levy; I believe it should have every power that may be vested in a local legislature.

The test of popular government.

This, of course, is subject to this criticism; it may be said that the experience of the past has shown to us that the common council of cities should rather be shorn of their powers. But is not this the crucial test of the ability of the people of a city to govern themselves? If, with a large body elected from separate districts, intrusted with the full power of local government, the cities of the State cannot or do not elect men who are competent to administer their affairs, then, I say, let them be blotted out forever and be administered by commissions appointed by the Governor or Legislature. The only way to do is thus to educate the people. It was Disraeli who said that true progress was to educate his party. But the way to do this is to educate the people, so that a man will understand when he goes to his polls at the spring elections that he has two men to vote for — the mayor, the chief executive of the city, and the member of his local legislature. He knows when he votes for his member, that he will have the power of appropriation, the power of taxation, the power of legislating upon all city affairs, to say what bonds of the city shall be issued, what obligations of the city shall be issued, what expenditures and what contracts shall be made. Then if there be not public spirit, and if there be not enthusiasm and patriotism enough in the inhabitants of the city when the issue is put fairly and squarely before them to elect such men as will represent them fairly, then let chaos come again, and they deserve it.

The council and heads of departments.

I believe that the heads of departments should be entitled to seats on the floor of the common council, but without the power to vote. I believe that the heads of the departments should not communicate

with the local legislature by means of long letters, which are pigeonholed, lost sight of, and never read. I believe the head of a department, if he have power to express himself, and anybody who knows his business can express himself, should be subject to question, interrogation, explanation, and to the hectic of debate upon the very floor of the common council. Public opinion rules to-day. Newspapers are our mayors, our common councils. Give us in addition not simply the agitation of some local Demosthenes during the week or two of political campaign, but through the year let us have a common council selected from a full body of the citizens, large enough to represent all the different elements of the city, where the heads of the departments must come to explain why and wherefore they want this appropriation or why and wherefore they have neglected this sewer, or why and wherefore they have not done this or that matter of municipal business, and, if they do not or cannot, then soon will the people gibbet them at the very crossroads of public opinion. . . .

206. *Municipal Government by Commission*

The principal sections of the recent Iowa law authorizing certain cities to establish government by commission follow: —

How the system may be adopted.

That any city of the first class, or with special charter, now or hereafter having a population of twenty-five thousand or over, as shown by the last preceding state census, may become organized as a city under the provisions of this act by proceeding as hereinafter provided. Upon petition of electors equal in number to twenty-five per centum of the votes cast for all candidates for mayor at the last preceding city election of any such city, the mayor shall, by proclamation, submit the question of organizing as a city under this act at a special election to be held at a time specified therein, and within two months after said petition is filed. . . .

Election of mayor and council.

In every such city there shall be elected at the regular biennial municipal election, a mayor and four councilmen. If any vacancy occurs in any such office, the remaining members of said council

shall appoint a person to fill such vacancy during the balance of the unexpired term. Said officers shall be nominated and elected at large. Said officers shall qualify and their terms of office shall begin on the first Monday after their election. . . .

›mination direct imary.

Candidates to be voted for at all general municipal elections at which a mayor and four councilmen are to be elected, under the provisions of this act shall be nominated by a primary election, and no other names shall be placed upon the general ballot except those selected in the manner hereinafter prescribed. . . . The two candidates receiving the highest number of votes for mayor shall be the candidates and the only candidates whose names shall be placed upon the ballot for mayor at the next succeeding general municipal election, and the eight candidates receiving the highest number of votes for councilmen, or all such candidates if less than eight, shall be the candidates and the only candidates whose names shall be placed upon the ballot for councilman at such municipal election. . . .

ıe city uncil.

Every such city shall be governed by a council, consisting of the mayor and four councilmen, chosen as provided in this act, each of whom shall have the right to vote on all questions coming before the council. . . . The mayor shall preside at all the meetings of the council; he shall have no power to veto any measure, but every resolution or ordinance passed by the council must be signed by the mayor, or by two councilmen, and be recorded before the same shall be in force. . . .

›wers of y council.

The council shall have and possess and the council and its members shall exercise all executive, legislative and judicial powers and duties now had, possessed, and exercised by the mayor, city council, board of public works, park commissioners, board of police and fire commissioners, board of waterworks trustees, board of library trustees, solicitor, assessor, treasurer, auditor, city engineer, and other executive and administrative officers. . . . The mayor shall be superintendent of the department of public affairs, and the council shall at the first regular meeting after the election of its members designate by majority vote one council-

man to be superintendent of the department of accounts and finances; one to be superintendent of the department of public safety; one to be superintendent of the department of streets and public improvements; one to be superintendent of the department of parks and public property; but such designation shall be changed whenever it appears that the public service would be benefited thereby. The council shall, at the first meeting, or as soon as practicable thereafter, elect by majority vote the following officers, a city clerk, solicitor, assessor, . . . and such other officers and assistants as shall be provided for by ordinance and necessary to the proper and efficient conduct of the affairs of the city. . . . Any officer or assistant elected or appointed by the council may be removed from office at any time by vote of a majority of the members of the council except as otherwise provided for in this act. . . .

The grant of franchises.

Every ordinance or resolution appropriating money or ordering any street improvement or sewer, or making or authorizing the making of any contract, or granting any franchise or right to occupy or use the streets, highways, bridges, or public places in the city for any purpose, shall be complete in the form in which it is finally passed and remain on file with the city clerk for public inspection at least one week before the final passage or adoption thereof. No franchise or right to use the streets, highways, bridges, or public places in any such city shall be granted, renewed, or extended, except by ordinance, and every franchise or grant for interurban or street railways, gas or water works, electric light or power plants, heating plants, telegraph and telephone systems, or other public service utilities within said city must be authorized or approved by a majority of the electors voting thereon at a general or special election. . . .

The system of recall.

The holder of any elective office may be removed at any time by the electors qualified to vote for a successor of such incumbent. The procedure to effect the removal of an incumbent of an elective office shall be as follows: A petition signed by electors entitled to vote for a successor to the incumbent sought to be removed, equal in number to at least twenty-five per centum of the entire

vote for all candidates for the office of mayor cast at the last preceding general municipal election, demanding an election of a successor of the person sought to be removed, shall be filed with the city clerk, which petition shall contain a general statement of the grounds for which the removal is sought. The signatures to the petition need not all be appended to one paper, but each signer shall add to his signature his place of residence, giving the street and number. One of the signers of each such paper shall make oath before an officer competent to administer oaths that the statements therein made are true as he believes, and that each signature to the paper appended is the genuine signature of the person whose name it purports to be. Within ten days from the date of filing such petition the city clerk shall examine and from the voters' register ascertain whether or not said petition is signed by the requisite number of qualified electors, and, if necessary, the council shall allow him extra help for that purpose; and he shall attach to said petition his certificate, showing the result of said examination. If by the clerk's certificate the petition is shown to be insufficient, it may be amended within ten days from the date of said certificate. The clerk shall, within ten days after such amendment, make like examination of the amended petition, and if his certificate shall show the same to be insufficient, it shall be returned to the person filing the same; without prejudice, however, to the filing of a new petition to the same effect. If the petition shall be deemed to be sufficient, the clerk shall submit the same to the council without delay. If the petition shall be found to be sufficient, the council shall order and fix a date for holding the said election, not less than thirty days or more than forty days from the date of the clerk's certificate to the council that a sufficient petition is filed. The council shall make or cause to be made publication of notice and all arrangements for holding such election, and the same shall be conducted, returned, and the result thereof declared, in all respects as are other city elections. The successor of any officer so removed shall hold office during the unexpired term of his predecessor. Any person sought to be removed may be a

candidate to succeed himself, and unless he requests otherwise in writing, the clerk shall place his name on the official ballot without nomination. In any such removal election, the candidate receiving the highest number of votes shall be declared elected. At such election if some other person than the incumbent receives the highest number of votes, the incumbent shall thereupon be deemed removed from the office upon qualification of his successor. In case the party who receives the highest number of votes should fail to qualify within ten days after receiving notification of election, the office shall be deemed vacant. If the incumbent receives the highest number of votes, he shall continue in office. The said method of removal shall be cumulative and additional to the methods heretofore provided by law.

207. *A Municipal Legislative Reference Bureau*

The creation of the new department

By an act passed by the legislature in 1906 the charter of Baltimore was amended by the establishment of a department of legislative reference. The new department is under the control of a board consisting of the mayor, city solicitor, president of Johns Hopkins University, president of the Municipal Art Society, and the president of the Merchants and Manufacturers Association of Baltimore. The members of the board serve without pay. It is their duty to employ a competent statistician as the executive officer of the board to organize and conduct the department. The executive officer holds office during good behavior and is subject to removal by a majority of the board for incompetence or neglect of duty. His salary must be at least $2000 a year.

The duties of the department.

The duties of the executive head of the department are defined as follows: "It shall be the duty of said executive officer to investigate and report upon the laws of this and other states and cities relating to any subject upon which he may be requested to so report by the Mayor of Baltimore, any committee of the city council, or the head of any city department; to accumulate all data obtainable in relation to the practical operation and effect of such

laws; to investigate and collect all available information relating to any matter which is the subject of proposed legislation by the General Assembly of Maryland or the City Council of Baltimore; to examine acts, ordinances and records of any state or city, and report the result thereof to the Mayor of Baltimore, any committee of the City Council, or the head of any department requesting the same; to prepare or advise in the preparation of any bill, ordinance or resolution when requested to do so by any member of the City Council; to preserve and collate all information obtained, carefully indexed and arranged so as to be at all times easily accessible to the city officials and open to the inspection of the general public; to perform such other duties as the said board may prescribe, and to make a full and complete report thereof on or before the first day of February of each and every year, to cover the work for the previous fiscal year ending December thirty-first."

CHAPTER XXVIII

MUNICIPAL FUNCTIONS

208. *Municipal Waterworks* *

AN investigation into the statistics of cities in the United States was made by the federal Department of Commerce and Labor in 1905, and the voluminous report summing up the results of this research contains the following general conclusions relating to waterworks: —

Importance of city-owned waterworks

No subject connected with the management of cities in the old or new world is attracting more attention at the present time than the operation of governmental industries, of which waterworks are among the most important. Of the 154 cities for which reports were secured for this bulletin, 113, or 73.4 per cent, owned or operated, or owned and operated, systems for supplying water to their citizens; and of the $831,368,707 invested in city industries, $535,957,239, or 64.4 per cent, represented the investments in waterworks. The importance of waterworks in the financial management of cities is shown not only by the foregoing figures, but by the fact that, with the exception of markets and public scales, waterworks have been operated by cities for a longer time than any other class of municipal industries.

The confused state of accounting.

It might be expected, therefore, that the cities of the United States would before this have developed systems of accounting that would show the results of the operation of these industries as fully as do the systems of privately owned waterworks, since the reports of such waterworks are prepared by corporations for the benefit of their stockholders. Such, however, is not the case. One of the results of this condition of affairs is that it is possible for an advocate of any particular policy of furnishing public utilities, either by the cities or by private corporations, to make almost any state-

ment concerning the comparative results of the operation of existing systems of public and of privately owned industries of the same class, without any chance of verification by reference to actual statistics. This condition of affairs will continue until the cities are able to provide, and do provide, accounts and statistics of the operation of their industries — and especially waterworks — that will furnish all the information which an accountant or a student of municipal affairs may need for determining the measure of success attending the operation of municipal industries.

'olicy of anage- ıent.

Cities may adopt any one of half a dozen policies in the management of their industries. The accounts of each city should be kept in such a manner as to show the measure of success which has been secured in the operation of the industry in accordance with the policy adopted. Of the possible policies which cities may adopt, mention is here made of the following:

)peration n a busi- ess basis.

A city may seek to operate industries so as to pay all of the operating expenses and the interest on investments, and also to make full provision for depreciation and sinking funds, such as is called for by good business management on the part of a privately owned corporation. This is the avowed policy, at the present time, of nearly all British cities in the operation of their waterworks. In Great Britain these industries are taxed the same as are privately owned industries. This taxation is based on the assumption that when a city operates a municipal industry that industry takes the place of a privately operated industry, and the city must allow taxes on its plant or the industry is not conducted on the same basis as a similar privately owned industry, and its measure of success is determined by different standards. On the other hand, most British cities credit their waterworks and charge their general expense account with all the water which the cities use for municipal purposes. This is a considerable amount, as the city is the largest single consumer of water within any municipality. But few American cities in their accounts with waterworks, credit them with water consumed, and none of them collect taxes from their waterworks. In a general way,

they assume that the water which the city uses approximates in value the losses of taxes due to the substitution of an industry owned by the city for a privately owned industry. If a city adopts the policy of operating its waterworks on the basis of earning interest on its investments, it should determine in advance what is meant by such earning — whether it is to be on a basis that requires allowances for taxation, depreciation, and sinking funds on the one side and for cost of water consumed on the other, or whether some other possible combination of these costs and allowances is to be used.

The cost basis.

A city may adopt the policy of furnishing the water to its citizens at cost. But what is meant by this phrase "at cost"? Does that term include any of the allowances for interest on investments, taxes, and depreciation, or not? This is something for cities to determine, for they should not allow the business to drift into any of the possible methods of management without conscious knowledge of what the actual basis of management is.

Public policy.

The city may, from considerations of public policy, conduct its waterworks and other industries so as to furnish public utilities to its citizens at less than cost. In that case it should determine the basis on which that cost is determined, so as to know what the taxpayers are contributing, directly or indirectly, by reason of the establishment of industries, in meeting interest on their indebtedness, and in paying off through sinking funds or otherwise the original costs of industrial plants.

The debts of waterworks.

In this connection, attention is called to the fact that in a few states the statutes, in establishing limits for municipal borrowing, except the debts of waterworks. This exceptional treatment of the debts of waterworks is based upon the legislative policy of having this class of municipal industries so managed as to pay all operating expenses, including interest, and provide for the amortization of loans from their income. On this basis of management their debts are properly exempted from consideration in legislation limiting the borrowing power of cities, since the interest and principal of such debts are fully met from industrial income,

and thus do not rest as a burden upon the taxpayer or constitute an economic lien upon their property. With this limitation of indebtedness, it is incumbent upon the city officials not only so to manage the waterworks as to realize these expected results, but also to show by proper accounting methods that such managerial results are being attained.

mportance f a definite olicy.

The Bureau of the Census does not concern itself with determining what is the true policy on which cities should manage their waterworks and other industries. It wishes, however, to emphasize the fact that methods of management should rest on some policy, directed by sound accounting control, which will present to the public all detailed information needed to show the results of management in conformity with the policy adopted.

209. *A Mayor's Fight for Good Electric Light Service*

The Hon. James M. Head, former Mayor of Nashville, Tennessee, in an address before the annual conference of the National Municipal League in 1906, gave an interesting account of his struggle to free the city from the control of an electric lighting corporation that was giving poor service: —

)vercharges y the ompany.

I found the electric light company with a contract with the city for ten years, about five years of which had expired. They supplied the city with lights at eighty-five dollars per arc light per annum. They were charging the people of the city eighteen cents per kilowatt for electricity, both of which charges I regarded as extortionate. I went to the company and asked for a readjustment, and the cancellation of their contract with the city. I was laughed at. No consideration was given to me, and I was again up against a serious proposition. Fortunately, however, in looking back through the acts of the Legislature, I found authority for the city to issue one hundred and fifty thousand dollars of bonds, to buy or build an electric light plant to light the streets, but with no power to sell electricity to private consumers — simply to light the public buildings and streets of the city.

The Legislature assembled in 1901, and I concluded that I

would ask the Legislature to amend the city charter and give the city the power to sell electric light, heat and power to private consumers. It was a matter in which no one was concerned but the people of Nashville. The City Council unanimously endorsed it. The people of Nashville were practically unanimous for it, all except those interested in public service corporations, and I went before the Legislature thinking I would have no trouble. I had the fight of my life. Every corporate influence in Tennessee was represented before that Legislature with its personal, financial and other influences to defeat that bill and prevent the city of Nashville from acquiring that little right to sell electric light, heat and power to private consumers. I spent nearly my entire time during the session of the Legislature trying to secure that right for the city.

The cont carried to legislatur

Finally I succeeded by a very close vote. After acquiring that power, I again endeavored to readjust the contract which the private company had with the city. They refused, and I immediately undertook the building of an electric light plant. By the time the foundations of that electric light plant were laid, the private company came forward and voluntarily (?) reduced the price of electricity to private consumers from eighteen cents to twelve cents per kilowatt. Before the plant was completed, the private company was making every contract it possibly could with private consumers for a term of years at five and six cents per kilowatt. When the plant was completed, there were about three years of their contract with the city unexpired.

The company's charges reduced.

I went to the representatives of the private company and told them that the city was now ready to engage in the electric light business, and wanted to know what they would do. At first nothing. But finally they concluded that the contract with the city did not pay them anything anyway; that it was an expense to them, and that they had a demand for all the light and power that their plant could furnish, and if I wanted to I could take over the lighting of the streets and public buildings of the city. So on the first of September, 1902, the city took over the lighting of

The city undertake its own lighting.

its public streets. For the year prior to that, the city had paid $49,270 for lighting its streets and public buildings.

The cost of municipal operation.

For the year after the city took charge of it we furnished to the city more than double the amount of light that we had previously had at a cost of $33,500. The cost of producing electricity, including operating expenses, interest upon bonds, repairs, improvements and everything except an estimate for the depreciation of the plant, was the first year a little over two and one-half cents per kilowatt, and it is being produced to-day at about 2.10 cents per kilowatt.

The terms with the company.

When the private company agreed for the city to take over the lighting of its streets and public buildings, I agreed with them as Mayor during the remainder of my term of office that the city would not engage in any private business, provided they continued to furnish electricity at the prices they were then charging, and I understand that since my retirement from office, that agreement has been kept, and the lighting company is making more money to-day than it did when it charged eighteen cents. The city is lighting its streets and public buildings and is not engaging in private work. But if the city had never turned a wheel of that plant costing $150,000, it would more than have paid for itself in three years in the reduction that it obtained for the private consumers of the city in the price of electricity. It could afford to keep that plant standing idle, and never turn a wheel, and it would save to the people the interest upon the investment ten times over every year.

210. *Work of a Tenement House Department*

The first report of the Tenement House Department of New York City contains this general summary of a gigantic task accomplished in less than two years (1902–1903): —

Investigation by the new department.

On January 1, 1902, a new department of the city government known as the Tenement House Department was created. Since that time all the tenement houses in New York have been examined

and their condition ascertained. Tenement conditions in many instances have been found to be so bad as to be indescribable in print; vile privies and vile sinks; foul cellars full of rubbish, in many cases of garbage and decomposing fecal matter; dilapidated and dangerous stairs; plumbing pipes containing large holes emitting sewer gas throughout the houses; rooms so dark that one cannot see the people in them; cellars occupied as sleeping places; dangerous bakeries without proper protection in case of fire; pigs, goats, horses and other animals kept in cellars; dangerous old fire traps without fire escapes; disease-breeding rags and junk stored in tenement houses; halls kept dark at night, endangering the lives and safety of the occupants; buildings without adequate water supply — the list might be added to almost indefinitely.

The task before the departmer

The cleansing of the Augean stables was a small task compared to the cleansing of New York's 82,000 tenement houses, occupied by nearly three millions of people, representing every nationality and every degree in the social scale. The task that confronted the department was not, however, limited to this. Without organization, without employees, with all its problems before it, it was on the very day that it came into existence confronted with an organized and vigorous attack in the Legislature upon the fundamental principles of the law for whose enforcement it was created. Without previous records, with almost no information in regard to the condition of the existing tenement houses, it was called upon to carry out an important and far-reaching scheme for their improvement, involving the structural alteration of over 40,000 buildings.

The devel ment of a force.

In the period under consideration in this report a new branch of the city government has been organized, its machinery created and a force of about 400 employees trained, disciplined and educated; far-reaching and important advances in legislation have been secured as a result of the department's action, and radical and vicious attempts to break down the tenement laws defeated.

Living accommodations for 16,768 families, or 83,840 persons,

eforms accomplished.

have been provided in sanitary, comfortable, and decent houses, each one of which has been built according to law: notorious evasion of and non-compliance with the laws has given place to their complete, uniform and impartial enforcement; the evil of prostitution has been practically abolished in the tenement houses; 337,246 inspections have been made; 55,055 violations filed; 21,584 repairs made to plumbing; 13,617 water-closets cleaned; 11,611 accumulations of filth removed from cellars and other parts of such buildings; 13,732 ceilings cleaned; 15,364 walls cleaned; 10,060 unsafe wooden floors removed from fire escapes and new iron floors substituted; 1,701 fire escapes erected on buildings that before were without this protection.

egistration owners.

The registration of 44,500 owners' names has been secured, thus fixing the responsibility for bad conditions in the tenements; contagious disease has been checked and prevented; 32,825 citizens' complaints have been investigated and the conditions complained of remedied; and an important tabulation and presentation of the population in every tenement house block in the Borough of Manhattan has been prepared that will be of incalculable value to the city.

esults of ie work.

The existing tenement houses have been frequently and systematically inspected; foul cellars have had the accumulated filth of years removed; defective and unsanitary plumbing which had apparently existed for long periods has been remedied; houses unfit for human habitation vacated; hundreds of houses have been radically reconstructed and improved; light has been let into dark rooms; vile yard privies and privy sinks have been removed and the whole sanitary condition of the city raised to a higher standard. The results of this work are clearly reflected in the reduced death rate, which in 1902 was 18.7 as compared with 20.0 in 1901, and in the first eight months of 1903 has been reduced to 18.0.

211. *The Health Department of a City* *

Some notion of the multifarious activities of a municipal health bureau can be gathered from this extract from a recent departmental report published by the City of Cleveland, Ohio: —

Supervis of the m supply.

There are about 3,500 farms which furnish milk for Cleveland. Since the establishment of dairy inspection last August to the end of the year 630 dairies have been inspected and scored according to the direction and on the score cards used by the Department of Agriculture. The average score was 44 points, which means a farm that ought not to be allowed to send milk to Cleveland. The number of cows which furnish milk to Cleveland is estimated at about 30,000; 427 have been tested with tuberculin and 109 of these or 25.52 per cent reacted, were killed and shown by post mortem to have been tubercular. If this ratio should hold then 7,656 tubercular cows are furnishing milk to the Cleveland market at the present date. The danger is obvious. How to avert it? If we average a cow at forty dollars, it would take $306,240.00 to pay for all these cows and to get rid of them. The sum is not so large as to make the solution of the problem an impossibility.

The figh against tubercul

In the great struggle with tuberculosis which is going on now all over the civilized world, Cleveland is not behind time. The city possesses a sanitarium on the City Hospital grounds and another in Warrensville. Both are of the approved type of modern structures, especially designed for the treatment of this disease. Without them we would be greatly handicapped in our efforts to retrench the ravages of the White Plague. The more patients can be induced to seek treatment in them, the better it will be for both patients and city. The patients' chances for recovery are greatly enhanced. They are kept in pure air day and night and learn, in a practical way, how to take care of the sputum lest they become dangerous to their fellow men. The city is delivered from a continual source of infection, the family receiving the greatest benefit. The money spent for the maintenance of these hospitals is a

good investment. The amount of danger taken and kept away from all citizens is incalculable. The educational feature of these institutions is not the least important, for the practical demonstration of the need of precaution and how to take it to avoid self-infection and infection of others is most fruitful of beneficial results.

Clinics for the poor.

As not all tubercular patients can go to the hospitals, clinics become a necessity for the care of the poor unfortunates who must stay in the harness as long as there is an atom of strength left in them. These clinics should be held at convenient hours so that the patients can come to them in the mornings before they go to work and in the evening after their day's labor is over. As long as these poor people, in their very infirmity, which was brought upon them without any fault of their own, strive to the utmost to take care of themselves and their families, the benevolent attention of the community must keep a watchful eye over them. To stretch out a helping hand to them is not an act of charity but the mandate of duty.

The economical advantage of the fight.

Then the economical side has to be considered: Keep these people self-supporting and we accomplish a great deal. Last, not least, is the sanitary aspect. If we could get hold of all our poor tubercular and instruct them how to live in order to regain the road to health, what a blessing we could bestow upon them. If we could prevail upon them to be careful with their sputum, what a danger we could take away from their families, their co-workers and the citizens in general. Just to help these poor people along, who have to work, but on account of their physical weakness are not able to earn enough wages to consult a physician, I established a tubercular clinic in the City Infirmary Office, spending out of my office hours from two to three hours daily in examining and treating patients.

The demand for a contagious disease hospital.

The necessity of a contagious disease hospital becomes every year more apparent. If we should have an epidemic of scarlet fever or diphtheria, forced hospitalization of patients would frequently become necessary, as it is impossible to keep an infected

family in a crowded tenement house strictly isolated. In New York City all such cases are taken to the hospital, by force if necessary. In Chicago they just passed through a serious outbreak of scarlet fever, having as many as sixteen hundred cases a week. The disease did not come on suddenly. It developed rather slowly, and the health officials informed me that the lack of a hospital for contagious diseases was one of the main factors in its spreading. The Cook County Hospital took as many patients from the city as it could, but it was soon filled up and every case had to be left where it developed. That was the way the disease got beyond control. In Cleveland we have no county hospital. We have practically nothing. In case of an epidemic we would be in a deplorable state and would be criticized by the whole United States, and justly so. The erection of a contagious disease hospital ought not to be delayed another season.

Crowded street cars.

People do not crowd because they like to, they crowd because they have to in order to reach their destination. The problem cannot be solved by preventing people from boarding an already filled car, but by putting more cars on the tracks. There have never been enough cars running during the so-called crowded hours to convey all passengers in a decent way. This can be shown by a very little figuring. In the morning people have to reach their work at the appointed hours and the tendency of people to hurry home after their day's work is done is laudable and needs encouraging rather than checking. I do not think it would be wise to prevent people from boarding cars and to make them wait for hours around the cold street corners without protection from rain and snow. The city must ultimately force the street car management to keep up with the growth of the city in number of lines and cars needed for the sanitary conveyance of the passengers.

212. *Municipal Parks* *

The way in which a modern city attempts to provide healthful recreation for the people is illustrated by this statement recently made by the director of parks in Cleveland, Ohio: —

An enlightened administrative policy.

The policy inaugurated by the present administration of abolishing the "Keep Off the Grass" signs and conducting the parks in the interests and for the welfare of all the people of Cleveland, regardless of their social standing or financial rating; of providing healthful forms of recreation and amusement for both young and old, and of extending, enlarging and improving the park system to keep pace with the city's needs and growth, has been continued and broadened. The usual special attractions were presented during the past year, and served to draw thousands of visitors to the parks who would otherwise have remained in ignorance of what Cleveland possesses in the way of landscape beauty in its really beautiful park system.

Band concerts.

Thirty-seven Sunday and 26 evening band concerts were given during the past summer, a total of 63, as against 49 in 1905. Two concerts were held each Sunday — one on the West Side, alternating between Edgewater and Brookside Parks, and one on the East Side in either Gordon, Woodland Hills, Garfield or Washington Park. The evening concerts were held at the smaller parks, giving each section of the city an opportunity to share in the pleasure this form of entertainment furnishes.

Special summer events.

The special days have come to be looked forward to as annual events. "May Day" was celebrated on June 2nd in Gordon, Garfield, Brookside and Edgewater Parks. Great interest was aroused on this occasion by the selection, by lot, of the May Queens and Maids of Honor at each park before the ceremonies commenced. "Turners' Day" was held at Rockefeller Park on Sunday, June 3rd, by the German Turning Societies. The annual romp of the children, formerly known as "Romping Day," was held on Monday, July 23rd, and called "Cleveland Day" in observance of the newly established holiday in memory of the birth of the city, which fell on Sunday, the 22nd. The program was rendered at Gordon, Wade, Woodland Hills, Garfield, Edgewater and Brookside Parks. The members of the City Council contributed to the success of the celebration by assisting in arranging the games and races and distributing the prizes. Special exer-

Children's days.

cises were also held on this day in the Public Square by the Old Settlers' Association. "Orphans' Day" was conducted on August 7th under the auspices of the Cleveland Automobile Club. The hundreds of inmates of the Cleveland Orphan Asylums were given a ride through the city's parks and treated to a lunch at Gordon Park. . . .

Winter sports.

On account of the mildness of the weather, the main events in the winter sports program had to be abandoned. However, a number of carnivals were held on the small corner lot skating rinks. Besides the seven park lakes, 35 of these made-ponds were in operation during the winter of 1905–1906. During the present winter there are four rinks less than last year in operation, due to the fact that some of the lots formerly used have been built upon and that it is becoming harder to secure suitable locations adjacent to water facilities.

Provision fc athletics.

During last summer 20 baseball diamonds were maintained in the parks and 30 on vacant lots in different parts of the city. Seven leagues were accommodated almost entirely on these grounds each Saturday afternoon, while the demands from independent teams for grounds by far exceeded the number available, notwithstanding the fact that the afternoon was divided so as to provide for two games being played on each diamond. Eight foot-ball gridirons were laid out in the parks. Two of these were exclusively for socker football. The golf links of 43 acres in Gordon Park were largely used during the golf season. On account of the proximity of the new shelter house to the links, and the consequent danger of injury being inflicted on the spectators and park visitors, the links will be established in Woodland Hills Park the coming season, where the space for playing this game is larger and more suitable. A cricket ground is located in Gordon Park. This is cared for and the materials furnished by the Cleveland Cricket Club. Three tennis courts were equipped in the parks last summer — two at Garfield Park and one at Edgewater.

Play-grounds.

During the past summer this department maintained public playgrounds in four of the parks, — Clinton, Fairview, Lincoln

and Washington, — and on four vacant lots in congested sections of the city. These grounds are equipped with basket ball courts, travelling and flying rings, sliding bars, swings, giant strides, turning poles, horizontal and parallel bars, trapezes, teeter-boards and ladders and sand piles. Each ground is in charge of an instructor, who improvises games for the entertainment of the children. The instructors are young men with college training, who are familiar with athletic work.

213. *The Question of Municipal Ownership*

In 1907 the National Civic Federation appointed a Commission on Public Ownership which made a careful and exhaustive investigation into municipal utilities in Great Britain and the United States. At the conclusion of the work the Commission agreed on the following general principles: —

Competition ineffective as a regulator.

First, we wish to emphasize the fact that the public utilities studied are so constituted that it is impossible for them to be regulated by competition. Therefore, they must be controlled and regulated by the government; or they must be left to do as they please; or they must be operated by the public. There is no other course. None of us is in favor of leaving them to their own will, and the question is whether it is better to regulate or to operate. There are no particular reasons why the financial results from private or public operation should be different if the conditions are the same. In each case it is a question of the proper man in charge of the business and of local conditions.

Sanitary undertakings.

We are of the opinion that a public utility which concerns the health of the citizens should not be left to individuals, where the temptation of profit might produce disastrous results, and therefore it is our judgment that undertakings in which the sanitary motive largely enters should be operated by the public.

Revenue-producing utilities.

We have come to the conclusion that municipal ownership of public utilities should not be extended to revenue-producing industries which do not involve the public health, the public safety, public transportation, or the permanent occupation of public

streets or grounds, and that municipal operation should not be undertaken solely for profit.

Terminable franchises.

We are also of opinion that all future grants to private companies for the construction and operation of public utilities should be terminable after a certain fixed period, and that meanwhile cities should have the right to purchase property for operation, lease, or sale, paying its fair value.

States should give certain powers to cities.

To carry out these recommendations effectively and to protect the rights of the people, we recommend that the various states should give their municipalities the authority, upon popular vote under reasonable regulations, to build and operate public utilities, or to build and lease the same, or to take over works already constructed. In no other way can the people be put upon a fair trading basis and obtain from the individual companies such rights as they ought to have. We believe that this provision will tend to make it to the enlightened self-interest of the public utility companies to furnish adequate services upon fair terms, and to this extent will tend to render it unnecessary for the public to take over the existing utilities or to acquire new ones. . . .

Conditions of successful operation.

Our investigations teach us that no municipal operation is likely to be highly successful that does not provide for:

First — An executive manager with full responsibility, holding his position during good behavior.

Second — Exclusion of political influence and personal favoritism from the management of the undertaking.

Third — Separation of the finances of the undertaking from those of the rest of the city.

Fourth — Exemption from the debt limit of the necessary bond issues for revenue-producing utilities, which shall be a first charge upon the property and revenues of such undertaking.

214. *The Case for Municipal Ownership*

Dr. Albert Shaw, a distinguished student of municipal government, has succinctly summed up the case for public ownership as follows: —

Monopolies should belong to the community.

All the monopolies of service, such as gas, water, trams and the like, should belong to the community. Simplify the administration, trust the people, give the municipality plenty to do, so as to bring the best men to the work, keep all the monopolies of service in the hands of the municipality, and use the authority and influence of the municipality in order to secure for the poorest advantages in the shape of cheap trams, healthy and clean lodgings, baths, wash-houses, hospitals, reading rooms, etc.

Politics and public utilities.

The pressure that would be brought to bear on the government to produce corruption under municipal ownership of monopolies like gas, electric light, transit, etc., would be incomparably less than the pressure that is now brought to bear by the corporations. The wear and tear upon the morals of a weak municipal government are greater by far when it comes to the task of granting franchises — that is to say, of making bargains with private corporations — than when it is attempted to carry out a business undertaking directly on the public account. Thus jobbery and rascality, wastefulness of public money, and bad results in the end, are more likely to be the outcome when the contract system is used in street cleaning, paving and various other public works, than when the municipality employs its own men to clean its own streets, lay its own pavements, and do its own public work on direct municipal account.

Municipal legal advisers.

Our municipal officials are elected or appointed for short terms. The city's legal advisers draw small salaries, and have no expectation of remaining in the public employ for more than a few brief years at most. They hope and expect after leaving the public employ to find lucrative private practice. Such practice can hardly be obtained except through the favor of the rich corporations. What motive, therefore, could impel the legal advisers of an American municipal government to fight desperately for the public interest as against the great array of legal talent representing those corporations that seek to gain, to enlarge or to renew franchises, on terms prescribed by themselves? In studying German contracts one is always impressed with a sense of the

first-class legal, financial and technical ability that the public is able to command, while American contracts always impress one with the unlimited astuteness and ability of the gentlemen representing the private corporations.

The ablest lawyers retained by corporations.

The ablest lawyers in all our cities are retained by these private corporations. They are given fat fees, directorships, stocks and bonds, and all sorts of pecuniary emoluments, besides political and social consideration. In return, they are expected to use their sharp wits, their technical knowledge of corporation law, and their training in the practical art of politics, to get the better of the community at large, and thus to retain or obtain for the benefit of their respective corporations very valuable public privileges, which ought not to be granted at all except upon the payment of their full value, with their exercise always subject to full public control. When municipal franchises and privileges are to be granted, it is not the municipal authorities that make the terms, but the private companies. The laws and ordinances that have to do with the granting of these privileges are carefully prepared by the attorneys of the corporations. They are never drafted by the legal representatives of the state or the city.

The source of boss rule.

The enormous sums of money contributed for purposes of political control by the corporations enjoying municipal supply privileges, have given us the boss system in its present form. And the boss system, which, in fact, knows no distinction of political party, is fast destroying state and municipal government as the steadfast and loyal servitor, defender and promoter of the public interest. We find public and municipal authority and prestige weak and low; while the authority and prestige of private corporations engaged in such services of municipal supply as public illumination and street transit are enormously active and strong. No such relative disparity as that between the prestige and strength of municipal government and the prestige and strength of private corporate influence, exists anywhere in the world. Direct ownership and operation would at least tend to build up the municipal government on the side of its dignity and prestige.

Dogmas in politics.

The views that one encounters in the United States, which presume to settle all such practical questions in advance by the recital of dogmas touching the nature of government, would be deemed the merest silliness by practical men in Europe. Those men see no possible reason why a modern government, which is, after all, nothing but the organization of the people for their own benefit, should not render the public any service which upon careful inquiry it may be agreed that the government can render with actual and permanent advantage to itself and the citizens.

215. *Politics and Public Utilities* *

Professor John R. Commons, as a member of the Civic Federation's Commission on Public Ownership, made an extensive study of the relation of municipal enterprises to politics, and prepared a number of valuable reports from which a few brief extracts are given here: —

Politics under public and private ownership.

I take it that the key to the whole question of municipal or private ownership is the question of politics. For politics is simply the question of getting and keeping the right kind of men to manage and operate the municipal undertakings, or to supervise, regulate and bargain with the private undertakings. The kinds of business that we are dealing with are essentially monopolies performing a public service, and are compelled to make use of the streets which are public property. If their owners are private companies they are compelled to get their franchises and all privileges of doing business, and all terms and conditions of service from the municipal authorities. And in carrying out their contract with the municipality they are dealing continually with municipal officials. Consequently it is absurd to assume that private ownership is nonpolitical. It is just as much a political question to keep and get honest or business-like municipal officials who will drive good bargains with private companies on behalf of the public and then see that the bargains are lived up to, as it is to get similar officials to operate a municipal plant. We do not

escape politics by resorting to private ownership — we only get a different kind of practical politics. . . .

The case of the Wheeling Gas Works

This can be tested by the situation of the Wheeling Gas Works. The secretary of the Wheeling Gas Trustees, quoted by my colleague as testifying to the political rottenness of the municipal gas works, is the same man who testified to the political rottenness of the private gas, electricity and street car companies of that locality. Instead of relying on his statements, I interviewed a large number of officials, politicians, business men, employees and others, and checked up his statements respecting both the gas works and the corporations. This shows that while the gas works are in politics, the public-service corporations are also in politics. The gas employees take part in the primaries of the Republican party and the motormen and conductors of the street car companies are given leave of absence on pay to work in the primaries of both the Republican and Democratic parties. Even the officers of the street railway employees' union take part in this kind of traction politics on behalf of their employees. The councilmen and aldermen nominated in this way control the municipal gas works and they control the franchises and contracts of the private companies. The "City Hall Ring" is just as much a ring of the political tools of the private corporations as it is a ring of municipal politicians. To pick out the politics of the gas works and not to see that it is bound up with the politics of the private corporations would be a perverse and one-sided method of investigation.

Politics and private ownership

In cities other than Wheeling the convention system prevails instead of the direct primaries, and consequently it was not found that the wage earners of the private companies took a similar active part in political campaigns. But in Syracuse, Allegheny, Indianapolis and Philadelphia, where municipal employees are named by politicians, it was found also that street car, electric, gas and water companies had employed men on the recommendation of councilmen, mayor or chairman of a political committee. This practice was carried furthest by the street car companies of Syracuse and

Allegheny. In Chicago, where a most rigid civil service law is enforced, no evidence of political appointments could be found in the municipal electricity or water departments during recent years, but men were hired on recommendation of aldermen by the private electrical companies at the time when their contracts were before the council for renewal.

Political appointments.

There is a distinction which has been found in all of these cases between political appointments in municipal undertakings and political appointments by franchise corporations. The alderman or mayor who secures the appointment of a political supporter on a municipal job exerts himself just as much to retain that man in his job as he did to get the appointment for him. But both he and his supporters take a different view when the appointment is secured with a street railway, gas or electric company. The alderman then says, "I get the job for you, but you must make good; I cannot keep the job for you; the company has the right to discharge you if you don't do your work." It is for this reason that the private company has an advantage over the municipal management under the spoils system, for it can get rid of a political appointee after trying him out and finding him inefficient.

216. *The Labor Problem in a City Department*

During his remarkable administration of the street cleaning department in the city of New York, Colonel George E. Waring devised this plan to secure harmonious coöperation on the part of the employees: —

Organization for conferences.

In order to establish friendly and useful relations between the men in the working-force and the officers of the department, I shall be glad to see an organization formed among the men for the discussion of all matters of interest. This organization will be represented by five spokesmen in a "board of conference," in which the commissioner will be represented by the general superintendent, the chief clerk, one district superintendent, one section foreman, and one stable foreman. It is suggested that the men who gather at each section station and the men at each stable (with

the boardmen from the nearest dumps) each elect one of their number to represent them in a general committee of forty-one (thirty-two from section stations and nine from stables), and that this general committee elect the five spokesmen by whom it is to be represented in the Board of Conference.

Meetings representatives.

The general committee will meet in a room, to be provided for it, at 2 P.M. every Thursday, except the third Thursday of each month. The members will not have their time docked for this. Their meetings will be secret, and they will be expected to discuss with perfect freedom everything connected with their work, their relations with the commissioner and his subordinates, and all questions of discipline, duties, pay, etc., in which they are interested, or which their sections, stables, and dumps may have submitted to them.

Conference for adjustment of differences.

The Board of Conference will meet at 2 P.M. on the third Thursday of each month, or as near to this date as the exigencies of the work will allow. The ten members of the Board of Conference will be on a perfect equality. It will establish its own organization and rules of procedure, and will elect one of its members permanent chairman and another permanent secretary, one of these to be chosen from the five officers, and another from the five spokesmen. It is hoped that this board will be able to settle every question that may come up to the satisfaction of all concerned, because most differences can be adjusted by discussions in which both sides are fairly represented. Should any matter arise as to which the board cannot come to a substantial agreement, the permanent chairman and the permanent secretary will argue the case before the commissioner, who will try to reach a fair conclusion upon it.

CHAPTER XXIX

LOCAL GOVERNMENT

217. *The New England Town Meeting*

THE government of the New England town is still controlled by an open meeting of the voters who convene at stated periods and on a special call of the selectmen, issued in the following form: —

TOWN WARRANT

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

To Garritt Barry, a Constable of the Town of Arlington, in said County, GREETING:

In the name of the Commonwealth of Massachusetts, you are hereby required to notify and warn the inhabitants of the Town of Arlington, who are qualified to vote in elections and town affairs, to assemble in the Town Hall, on Wednesday, the twenty-ninth day of April, current, at 8.00 o'clock, P.M., then and there to act on the following articles, viz: —

ARTICLE 1. To choose a Moderator to preside at said meeting.

ART. 2. To hear and act on the reports of any Town officers or committees heretofore appointed.

ART. 3. To see if the Town will erect an addition to the Locke School building substantially in accordance with the plans submitted by the Committee appointed March 16, 1908, make an appropriation for the purpose and determine in what manner the same shall be raised and expended.

(Inserted at request of Committee on New School House.)

ART. 4. To see if the Town will vote to enlarge the Locke School House lot by purchasing land on the northerly side of the present building and between Park Avenue and the present playground, make an appropriation therefor and determine the manner in which the same shall be raised and expended, or take any other action thereon.

(Inserted at request of Committee on New School House.)

ART. 5. To see if the Town will appropriate forty-four dollars and three cents to meet an unpaid bill contracted in 1906 for drain pipe laid on Town House Site, or take any action thereon.

ART. 6. To see if the Town will appropriate nine dollars and twenty-five cents to meet an unpaid bill contracted in 1907 for plants and labor in the care of Town House Lot, or take any action thereon.

ART. 7. To see if the Town will vote to carry liability insurance covering the work of any departments of the Town, and make an appropriation therefor, the same to be expended under the direction of the Selectmen, or take any action thereon.

ART. 8. To appropriate and raise by borrowing or otherwise such sum or sums of money as may be necessary for all or any of the purposes mentioned in the foregoing articles.

Hereof fail not, and make due return of this Warrant, with your doings thereon, to the Selectmen, on or before said day and hour of meeting.

[Seal]

Given under our hands at said Arlington, this fourteenth day of April in the year of our Lord one thousand nine hundred and eight.

FREDERICK S. MEAD,
J. HOWELL CROSBY,
WALTER B. DOUGLASS,
} SELECTMEN OF THE TOWN OF ARLINGTON.

A true copy, Attest:

GARRITT BARRY,
Constable of Arlington.

A large portion of the business of the town meeting is prepared by committees which submit reports with recommendations. This practice is illustrated by these extracts from the town documents of Arlington, Massachusetts: —

The Committee of Twenty-one appointed at the Town Meeting held March 16, 1908, has considered the articles in the warrant calling for appropriations and herewith submits its report.

ıe erection a new ıool ilding.

ART. 3. To see if the Town will erect an addition to the Locke School building substantially in accordance with the plans submitted by the Committee appointed March 16, 1908, make an appropriation for the purpose and determine in what manner the same shall be raised and expended.

The Committee has very carefully considered the plans and estimates as presented by the Committee appointed March 16, 1908, and after consultation with them and other town officers and citizens,

The Committee recommends the passage of the following vote: —

That the sum of $48,000 be appropriated for the erection and furnishing of an addition to the Locke School building, substantially in accordance with the plans of the Committee appointed by the Town, March 16, 1908, and that the Town borrow $45,000 of said sum, and in payment therefor issue eighteen negotiable notes or bonds, for the sum of $2,500 each, one payable in the year 1909, and one in each of the seventeen succeeding years, said notes or bonds to be signed by the Treasurer, and countersigned by the Selectmen, and to be designated on the face thereof, "Locke School Addition Loan," and to bear interest semi-annually at a rate not exceeding four per centum per annum; also that the remaining $3,000 be raised by general tax; and that the Committee appointed March 16, 1908, be authorized and empowered to supervise and direct the work of the erection and furnishing of said building and the expenditure of the sum hereby appropriated.

ART. 4. To see if the Town will vote to enlarge the Locke School House lot by purchasing land on the northerly side of the

present building and between Park Avenue and the present playground, make an appropriation therefor and determine the manner in which the same shall be raised and expended, or take any other action thereon.

The Committee thinks that the Town should purchase additional land adjoining the Locke school, for playground purposes, as it is proposed to erect the new building on part of the present playground. . . .

ART. 5. To see if the Town will appropriate forty-four dollars and three cents to meet an unpaid bill contracted in 1906 for drain pipe laid on Town House Site, or take any action thereon. . . .

The Committee learns that no appropriation was made which would cover the bills designated in Articles 5 and 6.

The Committee recommends the passage of the following vote: —

That the sum of $44.03 be appropriated to meet an unpaid bill contracted in 1906 for drain pipe laid on Town House site, and that said sum be raised by general tax in 1908.

ART. 6. To see if the Town will appropriate nine dollars and twenty-five cents to meet an unpaid bill contracted in 1907 for plants and labor in the care of Town House Lot, or take any action thereon.

The Committee recommends the passage of the following vote: —

That the sum of $9.25 be appropriated to meet an unpaid bill contracted in 1907 for plants and labor in the care of Town House Lot and that said sum be raised by general tax in 1908. . . .

Respectfully submitted,

GEORGE A. KIMBALL, *Chairman.*
CHARLES A. HARDY, *Secretary.*

218. *The Indiana Township* *

In the Western states it is the general practice to vest township government in the hands of elective officials. Indiana has sought by recent statutes to secure more effective popular control in the township government by the following provisions: —

The advisory board.

At the time of electing township trustees the voters of the several townships shall elect an Advisory Board, consisting of three resident freeholders and qualified voters of the township. The members of such Board shall subscribe and file with the Trustee an oath to faithfully and honestly discharge their duties as prescribed by law. Their terms of office shall be for two years from the day following their first election and until their successors are elected and qualified, and the terms of office shall thereafter be for the term of four years from the day following their election and until their successors are elected and qualified. If a vacancy occurs in said Board it shall be filled by the remaining members of the Board for the unexpired term. They shall meet annually on the first Tuesday of September, at a convenient place in the township, notice of which shall be given as hereinafter provided. At such annual meeting the members of such Board shall elect one of their members chairman for that year. Two members shall constitute a quorum.

The advisory board and finances.

At such meeting the Board shall consider the various estimates of township expenditures proposed by the Township Trustee, and shall have power to concur in such estimates, or in any part thereof, or to reject any proposed item, in whole or in part. When they shall have determined upon the estimates and amounts for which taxes should be levied upon the property and polls within said township for the ensuing year, they shall then determine and fix the rates of taxation upon such property and polls as to the estimated purposes severally. The rates so determined by such Board, they shall then certify to the County Auditor, who shall place the same upon the tax duplicate, and the same shall be collected and enforced as prescribed by law. The rates so prescribed

shall be deemed a levy and lien upon the property of such township from and after the first day in April of such year, and such levy shall be deemed an appropriation for the specific purposes for which such estimates are fixed.

The record of the board.

Such Board shall keep a record of their proceedings in a separate book to be furnished by such Trustee, and kept as a part of the records of the township, to be known as the Record of the Advisory Board of such township, and to remain in the custody of the chairman of such Board. Said Board shall elect one of its members Secretary for said Board, who shall record the proceedings thereof at any meeting, in full, under the direction of the Board, which shall be signed before the Board adjourns. Any meeting may adjourn from day to day till the business is completed. . . .

The taxpayer heard

At any session of such Board, any taxpayer of the township may appear and be heard as to the advisability of any estimate or estimates of expenditures, or any proposed levy of taxes, or the approval of the Township Trustee's report, or any other matter being considered by the Board.

219. *The County Council* *

The Western form of county government through elective officials and a small board of commissioners has been characterized by a good deal of corruption and inefficiency, and Indiana has attempted to bring about a reform by instituting county councils:—

The election of the board.

That within twenty days after the taking effect of this act, the Board of County Commissioners of each county shall meet and make and spread on record an order dividing such county into four councilmanic districts of contiguous territory, as nearly equal in population as possible: Provided, That no township shall be divided in forming such districts. The members of the county council shall consist of one councilman from each councilmanic district, to be elected by the voters of such district, and three councilmen at large, to be elected by the voters of the whole county.

The power of fixing th tax rate.

The power of fixing the rate of taxation for county purposes, and for all purposes where the rate not fixed by law is required to be

uniform throughout the county, shall be vested exclusively in the county council; and neither the board of county commissioners, nor any county officer or officers, shall have power to fix the rate for any such purpose whatever. The power of making appropriations of money to be paid out of the county treasury shall be vested exclusively in such council, and, except as in this act otherwise expressly provided, no money shall be drawn from such treasury but in pursuance of appropriations so made.

The preparation of estimates.

Before the Thursday following the first Monday in August, of each year, every county officer shall prepare an estimate, itemized with as great particularity as possible, of the amount of money required for his office for the ensuing calendar year; every clerk of a court or courts of a county shall prepare a separate similarly itemized estimate of the amount required for such year for each court of which he is clerk, and when a court consists of two or more judges who preside in separate rooms, or over separate divisions of the court, a separate similarly itemized estimate for court expenses in each room so presided in; and every board of county commissioners shall prepare a separate and similarly itemized estimate of all money to be drawn by the members of said board, and of all expenditures to be made by the board, or pursuant to its order, during such year for any and all purposes whatever. To each of such estimates there shall be appended a certificate verified by the oath of the officer preparing the same to the effect that in his opinion the amount fixed in each item will be required for the purpose indicated thereby.

Estimates open to inspection.

All of the above provided for estimates when so prepared, other than the one prepared by the county auditor, shall be presented to said auditor on or before the Wednesday following the first Monday in August, and they, together with the one so prepared by him, shall be kept on file in his office subject to inspection by any taxpayer of the county from the time they are filed. The county auditor shall give notice by publication one time in each of two leading newspapers of general circulation, printed and published in the county, if there be such, representing respectively the two

political parties casting the highest number of votes in such county at the last preceding general election, of the aggregate amount of each of said estimates before their presentation to the council.

At the regular annual meeting of the council on the first Tuesday after the first Monday in September, the auditor shall present all said estimates thereto, and may make such recommendation to the council with reference to the estimates as may to him seem proper. And it shall be his duty before such meeting of the council to prepare an ordinance in proper form, to be adopted by the council, fixing the rate of taxation for the taxes to be collected in the ensuing calendar year, and also an ordinance making an appropriation by items for such calendar year for the various purposes for which all of the above estimates are required. The council at said meeting shall act upon such ordinances, and by adopting the same or amended or substituted ordinances fix the tax rate within the limit prescribed by law, and make the appropriations. Each ordinance shall be read upon at least two separate days before its final adoption. The council shall have full power to require any estimate not sufficiently itemized to be so itemized by the person who prepared the same, and to appropriate for any purpose a sum not greater than that estimated in the item therefor. By a three-fourths vote of the council, and not otherwise, an appropriation may be made for an item not contained in any estimate or for a greater amount than that named in any item of an estimate.

220. *Centralization of Administrative Supervision*

This document illustrates the exercise of the power of removal by the governor of the state of New York: —

STATE OF NEW YORK,
Executive Chamber.

In the matter of the charges preferred against Thomas Hutson, county treasurer of the county of Chautauqua — Order of Removal.

e charges
d the
uring in
: case.

Charges of misconduct and malfeasance in office having been heretofore preferred by Herman Sixbey and Seth Scriven against Thomas Hutson the county treasurer of the county of Chautauqua and a copy of the said charges having been served on the said Hutson and an opportunity having been given him to be heard in his defense, and he having filed an answer denying any misconduct or neglect of duty, and an order having been made by me appointing Winfield S. Thrasher of the village of Dayton, county of Cattaraugus, commissioner to take the testimony and the examination of witnesses as to the truth of the said charges and to report the same to me and also the material facts which he deems to be established by the evidence, and the said commissioner having taken the testimony relating to such charges and in refutation thereof, and his report bearing date October 13, 1899, and the evidence taken by him, having been duly filed, and it appearing to me after an examination of the same that certain of the said charges are true, — that in violation of law and of his duty as treasurer he neglected to report to the board of supervisors of Chautauqua county the amount of interest received by him on county funds; that he accepted a present of $100 from the Fredonia National Bank, one of the banks in which the funds of the county were deposited by him; that the aggregate amount of said interest and present, to wit, $1695.92 was kept and retained by him as his own property until after the commencement of this proceeding, when said amount was paid by him into the treasury of the county; it is therefore

e order.

Ordered that the said Thomas Hutson be and he hereby is removed from the said office of county treasurer of the county of Chautauqua.

Given under my hand and the Privy Seal of the State at the Capitol in the city of Albany this seventeenth day of October in the year of our Lord one thousand eight hundred and ninety-nine.

THEODORE ROOSEVELT.

By the Governor:

WILLIAM J. YOUNGS,

Secretary to the Governor.

221. *Central Control of Local Finances*

One of the most serious problems of local government is the control of the financial operations of local officers, especially where one party remains in power from decade to decade. Ohio endeavors to maintain publicity and accountability throughout the state by vesting financial supervision in a central bureau: —

The bureau of inspecti

There is hereby established in the department of the auditor of state, a bureau to be known as the bureau of inspection and supervision of public offices; the principal officer of said bureau shall be known as the chief inspector and supervisor of public offices, and as such chief inspector, shall appoint not exceeding three deputies, no more than two of whom shall be of the same political party, who shall each receive a salary not exceeding two thousand dollars per annum, and a clerk who shall receive a salary not exceeding fifteen hundred dollars per annum, and in addition thereto an allowance for all necessary travelling and hotel expenses while absent from their places of residence in the discharge of their official duties. . . .

The system of accounti

The auditor of state through said bureau shall formulate, prescribe and install a system of accounting and reporting, in conformity with the provisions of this act, that shall be uniform for every public office and every public account of the same class, and which shall exhibit true accounts and detailed statements of funds collected, received and expended for account of the public for any purpose whatever, and by all public officers, employes or other persons, such accounts to show the receipt, use and disposition of all public property, and the income, if any, derived therefrom, and of all sources of public income and amounts due and received from each source, all receipts, vouchers and other documents kept, or that may be required to be kept, necessary to isolate and prove the validity of every transaction, and all statements and reports, made or required to be made, for the internal administration of the office to which they pertain, and all reports published, or that may be required to be published, for the in-

formation of the people, regarding any and all details of the financial administration of public affairs. . . .

spection accounts.

The auditor of state, a deputy inspector and supervisor, and every state examiner shall have power by himself or by any person legally appointed to perform the service, and shall make such examination at least once a year. On every such examination inquiry shall be made as to the financial conditions and resources of the taxing district; whether the constitution and statutory laws of the state, the ordinances and orders of the taxing district and the requirements of the bureau of inspection and supervision of public offices have been properly complied with; and into the methods and accuracy of the accounts and reports.

CHAPTER XXX

POLITICS AND GOVERNMENT

222. *The Operations of a Municipal Boss*

THIS testimony given by Mr. Croker during an investigation into the offices and departments of New York City in 1899 indicates the methods employed by a political dictator in operating party machinery. It also affords an insight into the character and outlook of one of the most striking municipal leaders of recent times.

Q. But you are simply the leader of the Tammany Democracy, are you? *A.* Yes, sir, you say so and it must be so.

Q. You admit it? *A.* Yes. I don't deny that.

Q. There is a difference between the Tammany Society. *A.* It is not necessary to bring all that up, I should not imagine, because everybody knows what they are. There is no use playing to the galleries.

MR. MOSS. We are making the record.

THE WITNESS. Give good straight talk and let us get through. There is no use making speeches. They all know everything you have said here. I am the leader of the party and I acknowledge it, and all these people are my friends and I am going to stick to them all the time. I don't shy away from them. (Applause from the audience.)

MR. MOSS. That is right. I hope the chairman will allow that once in a while.

THE WITNESS. No, we don't want it. Just give me good straight talk and let us settle it. That is all unnecessary. All those gentlemen know that I am considered the leader, and all those gentlemen are my friends, and yet you have taken a half hour up for nothing. Now, what is the use?

Mr. Moss. We will try to accommodate you. I do not want to make this examination any more lengthy or uncomfortable.

The Witness. You must pardon me now for saying that. I am only saying that for both of us. You have got quite a little time, and I have got a little time and we want to make good use of it.

Mr. Croker and his friends.

Q. You say these gentlemen[1] whom I have mentioned are your friends, do you? *A.* Yes, sir.

Q. You are their leader and have discussed together the political matters of the city, have you not? *A.* Yes, sir.

Q. You give certain directions and advice? *A.* Yes, sir.

Q. And they follow it? *A.* Some do.

Q. And when they do not? *A.* Some do and some don't.

Q. That is the only way a political party can be made practically successful, is it not? *A.* That is the way.

Q. It does not do to have divided councils at the head, does it? *A.* No, not very well.

City officials to be controlled by the organization.

Q. For that reason, when the party is dominant the men who are put into the city offices to administer the affairs of the city ought to be in such relation with the head that they will do what is generally considered by the organization to be the proper thing? *A.* We agree on that. We believe it is right, yes.

Q. The leader of that organization is always looked to for his advice, his judgment and his direction, is he not? *A.* Not always. Often things are done that the leader don't know anything about.

Q. But there are so many things that you cannot be expected to know and understand them all. I agree on that. *A.* There are lots of things done that I am not accountable for at all.

Tammany officials are city officials.

Q. I want to read the names of the Sachems.[2] We are not only talking but we have got to make a record that is to go to the Legislature and I want it straight. It is stated that the Tammany Sachems now are Thomas L. Feitner, President of the Board of Tax Commissioners, Grand Sachem; John Whalen, Corporation Counsel; John F. Carroll, the assistant or deputy of your-

[1] Men prominent in Tammany Democracy. [2] Officers in Tammany Hall.

self; William Astor Chanler, Congressman elect; John J. Scannell, Fire Commissioner; Charles F. Murphy, President of the Board of Health; Randolph Guggenheimer, President of the Council; Maurice Featherson, State Senator; Major Asa Bird Gardiner, District Attorney; John Kelly; George C. Clausen, President of the Park Commission; John Fox; Thomas J. Dunn, Sheriff; Secretary, Thomas F. Smith, Clerk of the City Court; Sagamore, J. T. Nagle; Wiskinskie, John A. Boyle. Is that list substantially correct? *A*. Yes, sir.

Q. And all or nearly all of those men hold prominent positions now in the city government? *A*. Yes, sir.

How part fille city

Q. Is it not a fact that upon the success of the Tammany ticket in the election of the fall of 1897 there was a gathering at Lakewood of the important members of the Tammany organization including yourself, at which was discussed the offices that were to be filled and the candidates for these offices? Is not that so? *A*. Oh, yes.

Q. And at that conference at Lakewood practically all of the important officers of the city and county government were selected, were they not? *A*. Well, pretty much.

Q. And your advice was asked upon them all, was it not? *A*. Mostly all, yes, sir.

Q. Do you recall any member or any important officer of the city government now who was not discussed with you and your advice asked about him? *A*. No, I do not.

Q. These men were all agreeable to you, were they not? *A*. Yes, sir.

Q. And most of them were your personal selection, were they not? *A*. Well, no, they were not; not my personal selection at all.

Q. But the selection of yourself or of your immediate associates? *A*. Yes, sir.

Q. And they were selected partly because of their presumed ability to fill the offices and partly because of the loyalty they had to the organization which had triumphed? *A*. Yes, sir.

Q. And in filling those offices you looked directly to the practical questions of sustaining the strength of the successful organization, did you not? *A.* Yes, sir. . . .

How Mr. Croker controlled Senators at Albany.

Q. Now I ask you this question; we notice that at the dinner the other night, the Democratic Club dinner, there were no senators present; no State senators. There were not, were there? *A.* No, sir.

Q. Why not? *A.* Because their place was in Albany, at their duty.

Q. And you told them so, didn't you? *A.* Yes, sir.

Q. They obeyed you? *A.* I think they did.

Q. They denied themselves the patriotic privilege of honoring the memory of Jefferson and eating a good dinner because you told them to stay in Albany? *A.* Because they owed it to their State and their duty.

Q. Because you told them? *A.* Because they owed it to their State and their duty.

Q. Do you suppose they would have denied themselves the patriotic privilege of honoring Jefferson and the pleasure of eating a good dinner in his honor if somebody had not directed them to forsake these pleasures and patriotic duties? *A.* They might not have come at all, without telling them.

Q. But you wanted to make sure, and they obeyed you? *A.* Yes, sir.

Q. And so you lost the pleasure of their company and they lost the pleasure of your company, and we all lost their oratory? *A.* In the discharge of their duty; yes, sir. I will stand by that.

Q. It is a fact then that you do control the physical movements of the members of the Senate on your side of the House? *A.* What kind of movements?

Q. Physical movements? *A.* Physical movements.

Q. Physical movements; yes, sir, do you? *A.* I don't know what you call physical movements; what do you mean by that? Let me know the meaning of that.

Q. The movements of their bodies? *A.* No, I don't control their physical movements.

Q. You prevented them from coming down from Albany? *A.* They can move their bodies wherever they like.

Q. But they could not move them into the Metropolitan Opera House at that dinner? *A.* They could if they wished.

Q. They were advised not to? *A.* They took the advice, I hope. I hope they did. Probably they did on their own account too.

A recalcitrant assemblyman reprimanded.

Q. Yes. Have you given any instructions or any advice to any one concerning a certain Mr. Reddington, an assemblyman? *A.* Yes, I have.

Q. What was that advice, and what were those instructions? *A.* That he ought to be reprimanded for voting for the Astoria gas grab.

Q. And you did that as the leader of the party, didn't you? *A.* Yes, sir.

Q. And it is your purpose to exercise your position in inflicting discipline upon him as the representative of your organization? *A.* That is left to the district.

Q. But you have advised it? *A.* I said it should be done, or ought to be done, yes.

Q. Then your organization and you don't leave members of the Legislature entirely free to vote as they please upon matters that come up, but you observe them and reprimand them and advise them to do whatever is necessary to get them to vote as you and your associates think they should, don't you? *A.* We expect them to stand by party measures. . . .

Municipal politics and private gain.

Q. Mr. Croker, did you sell Manhattan stock short prior to the assault on the Manhattan by the city? *A.* That is my affair.

Q. Did you not have quantities of that stock, in which you were interested, in brokers' hands on Broad Street? *A.* I will answer all that now to satisfy you. I never sold it short, and got no stock at all.

Q. I thank you, now we have an answer on that; what you

had was in somebody else's name, wasn't it? *A.* No one's name at all.

Q. You have no connection with Mr. Freedman, have you, in financial matters? *A.* Yes.

Q. He was not handling it for you? *A.* It was all private business.

Q. Working for your pocket all the time? *A.* Yes, sir; as you are working for criminals in New York.

Q. Just as I am after criminals? *A.* Yes.

Q. I take your language? *A.* Every man in New York is working for his pocket.

223. *Corporations in Politics**

In 1893 charges were brought against the Sugar Trust to the effect that it had been exerting improper influences on the process of tariff revision, and the United States Senate made an inquest into the truth of the matter. In the course of his statement before the investigating committee, Mr. Havemeyer described the political operations of the Sugar Refining Company: —

Contributions to the Democratic party.

SENATOR ALLEN. Had you or the sugar refining company contributed anything to the campaign fund in New York last year?

MR. HAVEMEYER. The Democratic campaign fund?

SENATOR ALLEN. Yes.

MR. HAVEMEYER. Do you mean the national campaign fund?

SENATOR ALLEN. The Democratic State campaign fund of last year?

MR. HAVEMEYER. I will have to answer that in the affirmative.

SENATOR ALLEN. Relatively, to what amount?

MR. HAVEMEYER. To a moderate amount.

SENATOR ALLEN. Have you any objection to stating what it was?

Contributions to the Republican State fund in New York.

MR. HAVEMEYER. I will have to look that up. I have not charged my mind with it.

SENATOR ALLEN. Did you also contribute something to the Republican campaign fund?

MR. HAVEMEYER. I will have to look that up.

SENATOR ALLEN. What is your recollection as t

MR. HAVEMEYER. The local fund?

SENATOR ALLEN. Yes; the State fund. That i campaign.

MR. HAVEMEYER. We always do that. I have i in my mind.

SENATOR ALLEN. So you contributed as a matter parties?

MR. HAVEMEYER. I will not say I contributed i can party without refreshing my memory.

SENATOR ALLEN. Is it to your best recollectio contribute to both the Republican and Democratic c in New York?

MR. HAVEMEYER. I do not think we did co Republican.

SENATOR ALLEN. In 1892 did you contribute t

MR. HAVEMEYER. The local parties?

SENATOR ALLEN. The national parties?

MR. HAVEMEYER. No, sir; but always to the loc that be distinct. . . .

MR. HAVEMEYER. Contributions to local politic have always been made by corporations, before t the trust and the American Sugar Refining Co doubt will continue to be. It is a very suitable a to do.

SENATOR ALLEN. You say it is a suitable and pro

MR. HAVEMEYER. Yes, sir.

SENATOR ALLEN. Why should the American Company contribute to either of the political part of New York?

MR. HAVEMEYER. We have large interests in t protection and fire protection. They need ever city furnishes and gives, and they have to suppo Every individual and corporation and firm, tru you call it, does these things, and we do them.

SENATOR ALLEN. And you contribute to both parties with the expectation of whichever party succeeds your interests will be guarded?

Local protection in return for contributions.

MR. HAVEMEYER. We have a good deal of local protection for our contribution.

SENATOR ALLEN. You expect protection from whichever party succeeds?

MR. HAVEMEYER. Yes, sir; local protection.

SENATOR ALLEN. Do you expect that simply from the Democratic party?

MR. HAVEMEYER. We expect protection from the police and fire department, and anything that the State and local organizations can give.

SENATOR ALLEN. Therefore you feel at liberty to contribute to both parties?

MR. HAVEMEYER. It depends. In the State of New York where the Democratic majority is between 40,000 and 50,000, we throw it their way. In the State of Massachusetts, where the Republican party is doubtful, they probably have the call. . . .

The dominant party gets the money.

MR. HAVEMEYER. It is my impression that wherever there is a dominant party, wherever the majority is very large, that is the party that gets the contribution, because that is the party which controls the local matters.

SENATOR ALLEN. Then, the sugar trust is a Democrat in a Democratic State, and a Republican in a Republican State?

MR. HAVEMEYER. As far as local matters are concerned, I think that is about it.

SENATOR ALLEN. In the State of Maine, you control the refinery at Portland, do you not?

MR. HAVEMEYER. That is defunct. We do not give anything to the State of Maine. . . .

SENATOR ALLEN. And this money that you contribute to these different parties for campaign purposes.

MR. HAVEMEYER. Local campaign purposes.

SENATOR ALLEN. Certainly; local campaign purposes — that

money comes out of the corporation of the sugar refining company? Where the money comes from

MR. HAVEMEYER. Yes, sir.

SENATOR ALLEN. And is a part of the expenses of the company?

MR. HAVEMEYER. Yes, sir.

SENATOR ALLEN. Charged up on your books as expenses?

MR. HAVEMEYER. Yes, sir.

SENATOR ALLEN. And the books of your refining company would show the amount of money which you have annually contributed to the respective political parties and the State in which it was contributed, and the party to which it was contributed, would they not?

MR. HAVEMEYER. I don't think it shows in that form.

SENATOR ALLEN. How would it show — as so much money?

MR. HAVEMEYER. It would show that a payment had been made and that payment would have to be explained by the party who made it.

SENATOR ALLEN. Made to some particular individual?

MR. HAVEMEYER. Yes, sir.

SENATOR ALLEN. He would have to render an account, which would not go upon the books, as to the manner in which that money was expended?

MR. HAVEMEYER. He would have to expend it in conformity with the instructions of the board.

SENATOR ALLEN. The manner in which he did expend it actually would not appear upon your books?

MR. HAVEMEYER. No, sir.

SENATOR ALLEN. Have you been in the habit of expending any money in connection with State legislatures? Legislation is not influenced.

MR. HAVEMEYER. You mean in the campaign of the State? You do not mean in the legislature itself?

SENATOR ALLEN. I mean in influencing State legislation.

MR. HAVEMEYER. Oh, never. We have contributed to local campaign parties, but never in the way of influencing legislation, and we never contribute with any obligation. . . .

A complete statement refused.

SENATOR ALLEN. So far as I am concerned, I request of the witness, Mr. Havemeyer, to produce full data as to all money contributed by the American Sugar Refining Company, or any of its officers, on its account or in its interest, in the different States of the Union in 1892 or 1893, for political purposes, to any political party, whether national, State, or local.

MR. HAVEMEYER. While I am perfectly willing to answer any material matters, under advice of counsel I decline to answer about outside matters. I decline to answer about local contributions. I know of nothing given to the national campaign. There exists no bargain of any nature, and we never claimed that the company was entitled to anything except what its merits required.

THE CHAIRMAN. Is that the answer you desire to make to this question?

MR. HAVEMEYER. That is the answer.

Mr. Havemeyer receives expert advice.

SENATOR ALLEN. Since your examination yesterday you have consulted counsel as to the propriety of answering questions with reference to divulging the amount of money that you paid for election purposes in the different States?

MR. HAVEMEYER. As to making any answer.

SENATOR ALLEN. And in declining to answer the question put to you I observed that you read your answer from a piece of paper?

MR. HAVEMEYER. Yes, sir.

SENATOR ALLEN. Was that answer prepared by you or by your counsel?

MR. HAVEMEYER. By me.

SENATOR ALLEN. Under the direction of your counsel?

MR. HAVEMEYER. No, sir; under the advice of counsel.

Wherever there is a financial interest there is a contribution.

SENATOR ALLEN. I do understand you, however, to say and repeat, that in States where you have a financial interest, at least where the sugar refining company has an interest as refiners, you do contribute to either the Democratic or Republican party as one or the other may be in the ascendancy in that State?

MR. HAVEMEYER. We do for local and State purposes, but not national.

SENATOR ALLEN. You never contribute to the campaign fund of a party in the minority?

MR. HAVEMEYER. We may; I will not say we do not.

SENATOR ALLEN. Your policy, however, is to stand in with the ruling power?

MR. HAVEMEYER. Not to "stand in" but to contribute to the campaign expenses of that party, for the reason that they, being in power and control, could give us the protection we should have.

SENATOR ALLEN. And by that means you placate —

MR. HAVEMEYER. Oh, no; there is no placation or obligation at all; nothing more than we consider the proper thing to do; everybody does it.

SENATOR ALLEN. Does any other corporation in these same States do the same thing, that you know?

MR. HAVEMEYER. I understand every individual, corporation, and firm in existence does it in their respective States.

SENATOR ALLEN. So the American Sugar Refining Company's politics, so far as its contributions to the campaign fund are concerned, is controlled by the political complexion of the State in which it happens to have a particular refinery? The "politics of business."

MR. HAVEMEYER. The American Sugar Refining Company has no politics of any kind.

SENATOR ALLEN. Only the politics of business?

MR. HAVEMEYER. Only the politics of business.

SENATOR LINDSAY. You say the company is separate and distinct from the officers and stockholders; each man has his own politics?

MR. HAVEMEYER. We have nothing to do with politics in any shape or manner. Our business is the refining of sugar at a slight profit that is consistent with a reasonable return on the industry.

224. *Officeholders in Politics*

Officeholders have been so prominent in political affairs that an eminent American publicist has called the party "an office-holders' device." From time to time, the Presidents of the United States have attempted to restrict the political activities of federal officers in local as well as national matters, by executive orders in the following tenor: —

EXECUTIVE MANSION,
July 14, 1886.

A warning to officers.

I deem this a proper time especially to warn all subordinates in the several Departments, and all office-holders under the general government, against the use of their official positions in attempts to control political movements in their localities.

Obtrusive partisanship condemned.

Office-holders are the agents of the people, not their masters. Not only are their time and labor due to the government but they should scrupulously avoid, in their political action as well as in the discharge of their official duty, offending, by a display of obtrusive partisanship, their neighbors who have relations with them as public officials. They should also constantly remember that their party friends, from whom they have received preferment, have not invested them with the power of arbitrarily managing their political affairs.

They should not meddle in local politics.

They have no right as office-holders to dictate the political action of their party associates, or to throttle freedom of action within party lines, by methods and practices which pervert every useful and justifiable purpose of party organization. The influence of Federal office-holders should not be felt in the manipulation of political primary meetings and nominating conventions. The use, by these officials, of their positions to compass their selection as delegates to political conventions is indecent and unfair; and proper regard for the proprieties and requirements of official place will also prevent their assuming the active conduct of political campaigns.

The proper line of conduct.

Individual interest and activity in political affairs are by no means condemned. Office-holders are neither disfranchised nor

forbidden the exercise of political privileges; but their privileges are not enlarged nor is their duty to party increased to pernicious activity by office-holding. A just discrimination in this regard, between the things a citizen may properly do and the purposes for which a public office should not be used, is easy in the light of a correct appreciation of the relation between the people and those intrusted with official place, and a consideration of the necessity under our form of government of political action free from official coercion.

GROVER CLEVELAND.

225. *An Assembly District Leader at Work*

This imaginary description of a day's work on the part of a New York City assembly district leader gives a substantially true account of the diversified activities of that important party official:

2 A.M. — Aroused from sleep by the ringing of his door bell; went to the door and found a bartender, who asked him to go to the police station and bail out a saloonkeeper, who had been arrested for violating the Excise law. Furnished bail and returned to bed at three o'clock.

6 A.M. — Awakened by fire engines passing his house. Hastened to the scene of the fire, according to the custom of the Tammany district leaders, to give assistance to the fire sufferers, if needed. Met several election district captains who are always under orders to look out for fires, which are considered great vote-getters. Found several tenants who had been burned out, took them to a hotel, supplied them with clothes, fed them, and arranged temporary quarters for them until they could rent and furnish new apartments.

8.30 A.M. — Went to the police court to look after his constituents. Found six "drunks." Secured the discharge of four by a timely word with the judge, and paid the fines of two.

9 A.M. — Appeared in the Municipal District Court. Directed one of his district captains to act as counsel for a widow against whom dispossess proceedings had been instituted and obtained

an extension of time. Paid the rent of a poor family about to be dispossessed, and gave them a dollar for food.

11 A.M. — At home again. Found four men waiting for him. One had been discharged by the Metropolitan Railway Company for neglect of duty, and wanted the district leader to fix things. Another wanted a job on the road. The third sought a place on the subway, and the fourth, a plumber, was looking for work with the Consolidated Gas Company. The district leader spent nearly three hours fixing things for the four men, and succeeded in each case.

3 P.M. — Attended the funeral of an Italian as far as the ferry. Hurried back to make his appearance at the funeral of a Hebrew constituent. Went conspicuously to the front both in the Catholic church and the synagogue, and later attended the Hebrew confirmation ceremonies in the synagogue.

7 P.M. — Went to district headquarters and presided over a meeting of election-district captains. Each captain submitted a list of all the voters in his district, reported on their attitude toward Tammany, suggested who might be won over and how they could be won, told who were in need, and who were in trouble of any kind and the best way to reach them. District leader took notes and gave orders.

8 P.M. — Went to a church fair. Took chances on everything, bought ice-cream for the young girls and the children. Kissed the little ones, flattered their mothers, and took their fathers out for something down at the corner.

9 P.M. — At the clubhouse again. Spent $10 on tickets for a church excursion and promised a subscription for a new church bell. Bought tickets for a baseball game to be played by two nines from his district. Listened to the complaints of a dozen pushcart peddlers who said they were persecuted by the police and assured them he would go to Police Headquarters in the morning and see about it.

10.30 P.M. — Attended a Hebrew wedding reception and dance. Had previously sent a handsome wedding present to the bride.

12 P.M.— In bed.

226. *Charity in Tammany Politics*

This clipping from the *New York Times* of September 1, 1908, explains one of the efficient secrets of the strength of Tammany leaders among the people, especially of the lower East Side of the city: —

The Sullivan leaders.

The Sullivans, Big Tim, Little Tim, Florrie, Dinny, Paddy — all the Sullivans, in fact, whose names are among the headliners in Tammany Hall, went to College Point yesterday, and with them went the Sullivan clan, 15,000 strong, in chartered steamboats, by train, trolley cars, and by ferryboats. They filled Donnelly's Grove at College Point from noon until late at night.

The start for the picnic.

It was the annual outing of the Timothy D. Sullivan Association in honor of their chief, the leader of the Third Assembly District. First there was a parade, which started in front of the association's headquarters, 207 Bowery. With chowder caps set jauntily upon their heads and wearing green and gold Sullivan badges, the clan started down the Bowery to Third Avenue, wheeled and marched to the East River, where the steamboats *Grand Republic* and *Pegasus* awaited their embarkation. Across the bows of the vessels were spread pennants of the Sullivans.

At the pier the parade came to a stop, and Larry Mulligan, half-brother of Big Tim Sullivan, waved his baton, for he was the leader of the parade, and the clan, or as much of it as could, scrambled aboard the steamboats. Meanwhile the bands never stopped playing. There were 4700 of the clan aboard the *Grand Republic* when she started up the river, and the *Pegasus*, just behind, carried 2900 joyous members of the association and their friends. Several hundred men were left on the pier, there not being room for them. They hustled to Long Island City and caught the first train there to College Point. The steamboats arrived at the park at about noon, and all through the afternoon the crowd kept growing, for political friends of the Sullivans, magistrates and district leaders from all over the city, dropped in to pay their respects to the Sullivans.

Diversions at the picnic.

There was fun aplenty. There always is at these Sullivan clan outings. There was plenty to eat, for one thing, and plenty to drink. It was a hungry and thirsty crowd which swarmed into the big dining hall and fell to on the green corn, roast beef, and pie, all they wanted of it. This meal was early in the afternoon. The real dinner came later, after everybody had been satisfied with the frolic or watching athletic stunts. It was a big job feeding that hungry Sullivan clan. The Sullivans themselves and their close friends did not sit at the general tables. They were otherwise occupied most of the day. There were numerous poker parties in the little private rooms about the grove. In fact, several poker parties were organized on board the steamboats as soon as they left the pier, and the players resumed juggling the chips at the grove.

Athletics and games.

On the athletic field there was a lot of fun. There are many fair athletes on the Bowery and throughout the Sullivans' district. But some of the stunts that had been arranged did not require athletic skill. For instance, the pie-eating contest. In this there were forty entries. There were a hundred or more juicy huckleberry pies. The rule was, "Eat half a pie, run 200 yards, eat a whole pie." The man who did this in the shortest time received a gold medal. He was Mike Sautinoli, time, 7 minutes. At the finish Mike's face looked like the inside of a pie itself.

The obstacle race provoked much mirth. The contestants had to hop some hurdles, skip over a lot of beer kegs, then some nets, and finally a collection of beer kegs, barrels, and tables. Anthony Bonanti won this race. He got a gold medal. The horse race had thirty-six starters. Each man rode a stage horse. Jim Marino won the race and got a gold medal. About 100 of the clan took part in the shoe race. They stripped off their shoes, and the shoes were forthwith mixed up. The racers ran 100 yards, returned, and after picking out their own shoes from the pile, put them on. John Russo won out and got a gold medal. Frank Burns won the running backward race. The fat men's race was great sport. Peter Burns, the old prizefighter, finally was de-

clared victor, but three heats were run. There was another man, an Irishman, who won the first two heats, but the judges decided that he did not weigh quite 200 pounds. Burns got a gold medal. There was also a baseball game.

The order had gone out before the start that no "dicers," or silk hats, were to be allowed at the outing. The clan obeyed. There was only one dicer to be seen. It was worn by Assemblyman James E. Oliver, "Paradise Park Jimmie," as he is known to the Sullivan clan.

Charles F. Murphy visited the grove late in the afternoon. Many other well-known Tammany Hall politicians of note were also there at one time of the day or another.

It was a grand day for the Sullivan clan, and they all voted it a big success.

In winter as well as in summer, Mr. Sullivan remembers his constituents. This account is from the *Times* of February 7, 1908: —

The free distribution of shoes.

More than 5000 pairs of shoes and warm stockings were distributed yesterday afternoon and last night among the poor men and boys of the East Side by the Timothy D. Sullivan Association. The distribution was made at 207 Bowery, and no worthy man was turned away while a pair of shoes was left.

The word had gone forth that it was the Sullivan "shoe day," and from every nook came the army of near-shoeless. And the shoes were handed out right and left without question. The association took every man's word for it that he was in dire need of the charity.

When the time came to begin the distribution the line of shivering men and boys extended from 207 three blocks down the Bowery to Grand Street. Another extended over to Rivington Street and around to Chrystie. In the long lines were scores whose footgear was a mere excuse. Boys there were who were so nearly barefoot that none could doubt the grim necessity for a charitable substitute for what they wore. Vagrant toes would

get out in the snow despite the most valiant efforts of their owners.

Scores of the unfortunates hardly waited to get into the street before they began shucking their tatters and replacing them with the warm stockings and serviceable shoes.

Although the time fixed for the beginning of the work was 4:30 o'clock in the afternoon, the lines were well started hours before. Nearly every man and boy was armed with a ticket. These were given out at the annual Christmas dinner given by the association. Many others were passed out to worthy sufferers yesterday in the Bowery lodging houses.

The shoes and stockings were in big boxes that were stacked up in regular order so as to facilitate the work of distributing them. The sizes were generous, so that no foot might find itself barred out. Many of the ticket holders found themselves equipped with number tens, when a six would have been ample, but this little discrepancy apparently gave the recipients no great concern. Ill-fits were better, obviously, than no fits at all. . . .

Mike Summers, brother-in-law of "Big Tim," stood by the long table behind which were piled the shoes. As Jamsie, the janitor, and Election District Captains called out the sizes John White, Treasurer of the Association, and Harry Applebaum, Secretary to "Big Tim," handed out the shoes.

227. *Some Primitive Election Devices*

These are interesting accounts of some election methods, unhappily not entirely obsolete, which were formerly quite common in American politics: —

The repeating of non-residents.

I was a resident of Kansas. I went one day to a town in an adjoining county, not knowing that they had had a county seat election there the day before, though if I had known it would not have prevented me from going there. However, I had not more than landed from the train, when the probate judge of that county met me; he looked astonished and astonished me by remarking,

"My God, Spooner, what are you doing here?" I told him the business that had called me there, when he asked me to get right out on the first train. I asked him why and he answered, "Why, man, you only voted thirty-two times here yesterday." I thought it was time to get out of that town, and when I inquired later I found that they had voted, religiously and constantly, as many times as possible, every man whose name they knew in any county of the State.

Checkmating an election count.

Those were the days when in county seat elections and railroad bond elections the number of votes cast in a county sometimes exceeded the population of the State. We had a railroad bond election in my own county, and from the adjoining rival town watchers came down. Neither town wanted bonds to go through for the benefit of the other town. So these watchers came down and watched our election. They were primitive in their method of checks and safeguards — they were farmers — and the chairman of that committee had his left-hand overcoat pocket full of corn; as fast as a vote was polled he transferred a grain of corn from that pocket to the right-hand pocket. One of our residents caught sight of the color of the corn, was gone a few minutes, came back with his pockets suspiciously full, and then stood for some time very close to the watching chairman, who soon found that his right-hand pocket was full and could not understand how it had happened. He lost his count.

A political worker in New York City thus describes his experience with a packed convention several years ago: —

How the minority ran the convention.

I attended as a delegate an Assembly district convention, which was composed of 93 delegates. Sixty-four of those delegates, duly certified, with their credentials in their hands, were known to be in opposition to what was understood to be the controlling power of the organization in the city (New York) — the county committee. Twenty-nine were in its favor. The man who was designated by the county committee to call that convention to order stood upon a narrow platform, with a police captain directly in front of him,

called for nominations for temporary chairman, refused every demand for a call of the roll, would not permit a standing vote, but simply called for a viva voce vote on the nominations made, and declared that one elected who was favored by the minority of the convention, claiming to base his declaration on his perception of volume of sound. The one so declared elected chairman was immediately inducted into office, the police captain standing in front protecting him in the retention of his place upon the platform, and that man in presiding over that convention never once allowed a call of the roll or a standing vote, but decided everything, even to his declaring the close of the convention, on his perception of volume of sound — recognized no appeal or any objection or protest whatsoever. The real majority of that convention, retaining their places on the floor, were obliged to organize the convention and conduct its proceedings without a platform for the real chairman to occupy.

228. *State Control of Party Organization*

The extent to which state legislation has gone in controlling party organization, and attempting to prevent boss rule is indicated by this extract from the recent primary law of Illinois :[1]

he list party mmittees.

SEC. 8. The following committees shall constitute the central or managing committees of each political party, viz.: A state central committee; a congressional committee for each congressional district; a senatorial committee for each senatorial district; a county central committee for each county; a city central committee for each city or village; and a precinct committee for each precinct. *Provided, however*, that nothing herein contained shall prevent a political party from electing or appointing in accordance with its practice other committees.

he state mmittee.

SEC. 9. (1) The State central committee shall be composed of

[1] While these pages were passing through the press this law was declared unconstitutional by the Supreme Court of Illinois, but the extract given here still serves its original purpose, that of illustrating an important tendency in state legislation controlling political parties.

one member from each congressional district in the State and shall be elected as follows:

At the August primary held in the year A.D. 1908 and at the April primary held every two years thereafter, each primary elector may vote for one candidate of his party for member of the State central committee for the congressional district in which he resides. The State central committee of each political party shall be composed of members elected from the several congressional districts of the State as herein provided and of no other person or persons whomsoever. The members of the State central committee shall, within thirty days after their election, meet in the city of Springfield, and organize by electing from among their number a chairman and may at such time elect such other officers from among their own number, or otherwise as they may deem necessary or expedient. The outgoing chairman of the State central committee shall, ten days before the meeting, notify each member of the State central committee elected at the primary of the time and place of such meeting.

Precinct member.

(2) At the August primary held in August, A.D. 1908, and at the April primary held every two years thereafter, each primary elector may write or attach in the space left on the primary ballot for that purpose the name of one qualified primary elector of his party in the precinct for member of his political party precinct committee. The one having the highest number of votes shall be such committeeman of such party for such precinct. In case of a tie the primary judges shall cast lots. The official returns of the primary judges shall show the name and address of the committeeman of each political party.

County committee

(3) The county central committee of each political party shall consist of the members of the various precinct committees of such party in the county.

[4. The senatorial committee.]

Congressional committee.

(5) The congressional committee of each political party shall be composed of the chairmen of the county central committees of the counties composing the congressional district, excepting that

in congressional districts wholly within the territorial limits of one county, or partly within the territorial limits of one county and partly within the territorial limits of another county, then the members of the precinct committees of the party residing within the limits of the congressional district shall compose the congressional committee.

(6) The city central committee of each political party shall be composed of the precinct committeemen of such party residing in such city.

rs (7) Each committee and its officers shall have the powers usu-
s. ally exercised by such committees, and by the officers thereof, not inconsistent with the provisions of this Act. The several committees herein provided for shall not have power to delegate any of their powers or functions to any other person, officer or committee, but this shall not be construed to prevent a committee from appointing from its own membership, proper and necessary sub-committees, and particularly defining, by resolution, the duties of such sub-committees. . . .

con- SEC. 10. (*a*) On the second Wednesday next succeeding the April
ns. primary, the county central committee of each political party shall meet at the county seat of the proper county, and proceed to organize by electing from among its own number a chairman, and either from among its own number or otherwise, such other officers as said committee may deem necessary or expedient. Such meeting of the county central committee shall be known as the county convention. The county convention of each political party shall choose delegates to the senatorial, congressional, and State convention of its party: *Provided*, only precinct committeemen residing within the limits of a senatorial or congressional district shall participate in the selection of delegates to senatorial and congressional conventions respectively: *And, provided, further*, that in the county convention each delegate to the county convention shall have one vote and one additional vote for each fifty or major fraction thereof of his party as cast in his precinct at the last general election.

(*b*) All senatorial conventions shall be held on the third Wednesday next succeeding the April primary.

(*c*) All congressional conventions shall be held on the fourth Wednesday next succeeding the April primary. The congressional convention of each political party shall have power to choose and select delegates and alternate delegates to national nominating conventions and to recommend to the State convention of its party the nomination of candidate or candidates from such congressional district for elector or electors of President and Vice President of the United States.

(*d*) All State conventions shall be held on the fifth Wednesday next succeeding the April primary. The State convention of each political party shall have power to make nominations of candidates for the electors of President and Vice President of the United States, and for trustees of the University of Illinois, and to adopt any party platform and to choose and select in accordance with the rules and regulations of its party, delegates and alternate delegates to national nominating conventions.

(*e*) Each convention may perform all other functions inherent in such political organization and not inconsistent with this act.

CHAPTER XXXI

TAXATION AND FINANCE

229. *The Problem of Assessing Property*

THIS extract is from a recent report of the Minnesota Tax Commission: —

ıe impor-
ıce of the
ıessor.

More important than the other three groups of influences on the assessment is the assessor. While he is hampered by the public opinion created by the statutory provisions referred to above, and checked in his work by the attitude of boards of review and equalization, the fact remains, nevertheless, that he is the maker of the assessment. As Professor T. S. Adams remarked in an address at the meeting of the National Tax Association, measured in dollars and cents the work of the local assessor is far and away the most important part of our fiscal system. Continuing, he said: "Compared with the general property tax, corporation taxes, inheritance taxes and all other taxes put together pale into insignificance. In 1902 more than three-fourths of all the general revenues of the state and local governments came from taxes upon general property. . . . Whether we keep or discard the taxation of personal property, the local assessor will, for many generations, continue to play the principal rôle in the work of state finance, and upon his probity and efficiency will depend the real success or failure of our system."

ı old
fice under
:w con-
tions.

The local assessor is one of the heritages that came with the township system of local government. Elected each year, he is supposed to represent the ideas of the people of the township and to carry them out in the making of the assessment. The time required to do this important work is estimated by the standards of an earlier day when property was limited and what there was,

easily enumerated and valued. The pay of this officer compares favorably with the old view of an assessment. Even this is not granted in some districts, the office being put up to the man who will make the lowest bid. In other districts, the man who needs the money is given the position. In the approximately 2,600 townships in the state, the larger number of voters try to select men for the office of assessor who will make a fair assessment as judged by the community opinion. This opinion, however, does not square with the law, since the basis of taxation is in public opinion uniformity and equality as compared with neighboring towns and counties rather than the statute requirement.

The fact remains, however, that an army of assessors, each one a law unto himself, and working on different standards of value, cannot but produce great inequality of assessment even if the conditions under which he worked were ideal. Ideal conditions do not exist. The assessor in some instances is forced to recognize the political element in making his assessments, to take into consideration the demands for favors from personal friends and political associates, the lack of time, insufficient pay, and the real inherent difficulty of the task. It is this last phase of the matter that is the most important and demands the largest consideration. The local assessor system as now organized under the law, while not a failure, will not permit of the kind of assessment that spells efficiency in taxation. The property holdings of individuals and companies extend into many districts of the state, so that the very conditions of competitive business demand equality of assessment, not only between individuals but as between different districts where business enterprises are located that compete with one another.

Fact
fecti
asse

High rates of taxation are pretty sure to affect the appraisal of the local assessor who has in view the tempering of the wind to the shorn lamb. As a heavy assessment may be met by complaint against the assessor or by the removal of the parties to other towns, the determination of the assessment becomes a matter of agreement between the town authorities and the taxpayer. The forces

of compromise, of what the people will stand, are factors that have much to do with the placing of the assessment.

230. *The Separation of State and Local Revenues*

Growth of the idea of separation.

The proposal to separate state and local revenues has been made many times in the last ten years. The taxing officers of the various states have almost without exception hailed the plan as a means of getting away from the difficulties, uncertainties, and inequalities of the general property tax. In brief, the idea of separation is to secure the state revenues from statewide corporations and business concerns, such as railroads, insurance companies, public utility corporations, telegraph and telephone companies, etc., and to give over to the localities the revenues arising from the taxation of real estate, and in some proposals, the tax upon the assessment of certain kinds of personal property.

Reasons advanced for separation.

Four reasons, more or less important, and advanced with different degrees of emphasis, may be assigned for the separation of the state from local revenues: (1) The first of these reasons is the desire to secure a larger revenue to meet state expenses. This point of view emphasizes the original demand for heavier and more specific taxes upon corporations. As such taxes have been developed, the attention of legislatures and taxing officials has been drawn to the wisdom of that system of taxation and the better results ensuing from it over and above the old method of local assessments.

(2) As time wore on the need of more revenues, while insistent, no longer remained the essential element in demanding statewide taxation of specific corporations. The question of equality of assessment, ease of administration and the elimination of the annual wrangle with local assessors and corporation officials became dominant in the thought of men administering the tax laws, making the assessments, levying and collecting the taxes. This was a step toward the recognition of the more fundamental difficulties inherent in the tax system itself, those involved in the

question of equalization and the evils and inconsistencies of the personal property tax.

(3) The raising of revenues for state purposes by a general levy upon all the real and personal property of a state was, and is yet in most commonwealths, the method of securing the funds necessary to carry on the work of the state governments. Out of this system arose, because of the failure of assessors to make true value assessments, the problem of equalization in every division of government — town, village, city, county, and state. Boards of equalization were devised in the law for each of the divisions of government as seen in the boards of review, county boards of equalization, and the state board of equalization. The first was to equalize between individuals, the second between local governments, and the third between the larger divisions of local governments, the counties. Equalization tended by the very nature of the problem involved to hold the assessment down to the minimum point rather than to encourage the increase in the assessments.

(4) The last of the four reasons referred to above was the breakdown in the general property tax. So far as real estate was concerned the local assessment of real estate reached every piece of property, though often at varying assessments. The same could not be said of the personal property. The levy of a state tax upon real estate resulted in contributions in varying percentages of assessment, but the personal property tax fell upon tangible goods and failed to reach the great values bound up in securities, money and other intangible representations of wealth. To reach these by giving over the local assessment method of dealing with personal property and commuting the whole tax upon personalty of corporations and the holdings of individuals by levying a flat rate upon franchise values, capitalization of earnings, was but the inevitable result of the breakdown of the general property tax.

Advantages of separation.

The advantages to be derived from the separation of state and local revenues are declared to be: (1) conformity of tax system to natural division of government; (2) greater equality of assess-

ment; (3) lower tax rates; (4) the elimination of the conflicts between city and country; and (5) a greater flexibility of taxes and larger adaptation of means to end. The growth of statewide business has made it necessary to materially modify the tax system. The taxation of corporations by special acts has tended steadily to separate the sources of the state's revenues from those of the local governments. It is felt that in addition to securing a natural division of taxing function based upon the character of the government, such separation would eliminate the efforts now made to keep assessments lower, since the question would then become a local one. Local tax rates would be reduced by the amount of the former state tax and some of the old causes of strife between city and country over the assessments, no longer existing, would do away with that friction since each community would in a large measure determine its own basis of assessment. And finally each community could work out for itself the adjustment between assessment, taxes and expenditures which seemed wise to the people of the district. Two methods of securing the separation of state from local revenues have been suggested: one is known as the special taxation of corporations and the other is called the apportioning of contributions to the state on the basis of local expenditures.

'he abandonment of ıe general roperty tax ır state urposes.

1st. The first method proposes the abandonment of the general property tax as a means of raising state revenues and the substitution in its place of special corporation taxes, tax on inheritances, license taxes, etc. It is not, however, every state that has sources of revenue large enough to make it possible to raise all the revenue needed from the tax on corporations and inheritances. The best that can be done in states where such is the case is to develop as far as possible the special taxes on corporations and inheritances and rely for the balance upon the taxation of the general property in the state. The state of New York has carried this plan to its logical conclusion and has accomplished the complete separation of the state revenue from the local revenues, though the general property tax still exists as the means of raising the moneys

needed to meet local expenditures. Pennsylvania levies no state tax upon the general property of the state, but the state does collect for both state and local purposes a tax upon licenses, sales of merchandise, capitalization of corporations, inheritances and gross earnings of public utility corporations. In the sense of separation of state and local revenues Pennsylvania has not accomplished the results that New York has been enabled to put in force, but in the sense of centralization of tax collection and administration Pennsylvania has made marked progress by devising the system of dividing the tax between the state and local governments collected through the agency of the state. The relation of revenues to expenditure is overlooked in this plan; the state finances lack elasticity, but the local governments are able to secure it by modifying the rate on real estate.

2nd. In order to meet the difficulty referred to above, that of insufficient sources of revenue to permit of separation of state and local revenues, it has been proposed to call upon the local governments to contribute to the expenses of the state in proportion to their expenditures and by this means secure what was accomplished by the special taxation of corporations. Professor Seligman in his paper before the National Tax Conference of 1907 describes this method as follows: "At present the state general property tax is distributed among the counties by apportioning the quota of each according to the assessed valuation of the property. The apportionment-by-expenditures method as opposed to the apportionment-by-valuation method would distribute the amount to be raised for state purposes to each county on the basis of the total expenditure, or, what is the same thing, on the basis of the total revenue collected to defray this expenditure within each county and all the taxing districts contained in the county." This method gives the local government the opportunity to levy taxes as it sees fit, to secure greater equality of tax burden and economy, and renders it possible to know what the relation is between state and local expenditures.

Tax of l acc to e tur

The objection urged against this plan is the check it places upon

jections he plan.

local expenditures. This would be especially true of new communities that are struggling to secure better roads, pavements, sewers, electric lights, and schools. Such communities would be punished for the expenditures made for improvements. While this objection in the long run would not hold good it is doubtful if the legislatures of any considerable number of states would look with favor upon the plan. They would prefer the more direct way of taxing corporations.

gon's eriment.

One state, Oregon, however, has adopted this system of apportioning state expenses. The tax commission of that state in their report for 1906 have the following to say regarding the system: "Happily, Oregon has taken a very advanced stand in the matter of state apportionment. In fact, the method in force in this state at the present time, and as contemplated by our present statutes to be enforced in the near future, is very near ideal, and reduces to a minimum the necessity of indirect taxation for state purposes." It also avoids the chief objection to the separation of state from local revenues, that of inelasticity, the lack of coincidence between revenue and expenditure.

sticity of enue.

This desirable feature of a taxing system exists in the case of the general property tax under whose provisions more revenue was secured by raising the tax rate on the same assessment or a lesser amount on a larger assessment by a change in the tax rate. Separation of the state's revenues from those of the local government and the getting of the revenue from corporations lost to the state the advantage of elasticity. Says the Oregon tax commission in its report for 1906: "The general property tax is certainly elastic and self-regulative, which cannot be said of the indirect method of raising revenues for state purposes. The state has no control over the happening of events which make the tax inure to it. It can neither ascertain the number of such events nor the time of their happening, in advance of their taking place, and it must fix the rates beforehand. The consequence is that it must accept the sums coming due to it without any power on its part to increase or diminish them to meet its financial needs. The indirect tax creates

either a surplus or a deficit at the end of the fiscal year, and the state is powerless to determine which way the balance will be. Further the taxpayer does not take as keen an interest in the expenditure of his money as when he pays it directly into the public treasury and consequently does not hold the public officers to the same strict accountability. We contend for the principle that tax contribution and demand for revenue shall act and adjust themselves each to the other."

231. *Taxation of Personal Property* *

It was for a long time a theory of American finance that all property should be taxed equally at a certain valuation, but with the growth of enormous masses of wealth in the form of intangible securities which escape assessment, serious defects have become apparent in the application of the old principle, and a demand has come for its abandonment. The problem is fully considered in the recent report of the Minnesota Tax Commission: —

Why the personal property tax is retained.

The criticism against the general property tax has been directed almost wholly toward the personal property side of the tax. Commission after commission, author after author, and expert after expert, have fulminated against the tax upon personal property. Despite these criticisms this form of tax still continues to stand on the statute books in many states as well as in Minnesota. The general fear has been that its removal or modification might result in an increase in the burden upon real estate, which is regarded as a fundamentally just and practically workable tax. This contention has no little weight and will check any change in the personal property tax until the owners of real estate are satisfied that the tax burden on their property is not increased, but lessened, by the alteration of the law.

The burden on tangible personal property.

As has been shown in some degree in previous chapters, the assessment of personal property is a matter of the greatest difficulty not only in determining the values but in locating the property. In most instances the assessor is compelled to ask the value of stocks of goods, to use an average value for determining the assessment against

live stock, and, when it comes to the existence of intangible property, to depend entirely upon the word of the owner. A great deal of personal property necessary to the existence of every home is unproductive; sewing machines and pianos pay no visible money return to their owners, but are listed because they can be seen. On the other hand the owner of so-called intangible wealth refuses to list it, either because it is easily concealed or because the tax rate is such a large part of the income derived from the property that to report it practically means confiscation of the income. Thus the anomaly exists of tangible non-earning property paying a heavy tax and intangible income-bearing wealth going into hiding and escaping the payment of its share of the tax burden.

No increase in personal property returns.

In the last ten years the personal property returned by the assessors in Minnesota is about one-fifth of the total assessment, and the credits and moneys returned will average about one-fourth of the personalty. This close approximation to a given proportion indicates hide-bound methods of making assessments and the return of practically the same amount of goods each year except as the aggregate is increased by the growth of population. Testing this statement by a comparison of per capita returns for assessments, it will be found that the per capita assessment of personal property is no larger in 1905 than it was in 1880, though the per capita total assessment grew from $343.91 in 1880 to $443.71 in 1905. The per capita returns for credits in 1880 and 1905 are practically the same, but less than they were in 1885 and 1890.

Small returns of bank deposits.

The conclusion to which all of the facts brought forth in the various tables trend is that the burden of the general property tax falls upon the real estate and the familiar everyday classes of property known to every one. The return of moneys to an amount less than four per cent of the deposits in banks is evidence of defects in the law and the method of making assessments. The law fails to distinguish between types and kinds of property, regarding them as alike, whether big or little, and whether income earners or unproductive; the assessment was wrong in method when inaugurated and has steadily grown more unsatisfactory as

the machinery of assessment has had to cope with larger and more difficult problems.

Penalti for fals returns

Despite the showing made of the inadequate returns of the personal property tax even under coercion, there are men who believe the general property tax law can be enforced and who call for more stringent methods, asking that men be punished by imprisonment and confiscation of their property for falsification of returns. While it is not generally known, Minnesota has a law on the statute books which is severe, yet it seems to have had practically no effect in securing better enforcement of the law regarding assessment returns. The law reads as follows: "Every person who, in making any statement, oral or written, which is required or authorized by law to be made as a basis of imposing or reducing any tax or assessment, shall wilfully make any statement as to any material matter which he knows to be false, shall be guilty of a gross misdemeanor. Whoever shall be convicted of a gross misdemeanor for which no punishment is prescribed by any statute in force at the time of conviction and sentence shall be punished by imprisonment in the county jail for not more than one year, or by fine of not more than one thousand dollars."

The fa of dras methoc

Ohio and Iowa have resorted to tax ferrets to get at their hidden personal property. Such officers were given large rewards in return for discovery of property upon which back taxes could be collected. The result was unsatisfactory, forcing men to leave the state, and reducing rather than increasing the amounts of property on the personal property rolls. The signers of a supplemental report made by the New York special tax commission in 1907, stated that: "Every possible attempt has been made to enforce the personal property tax. We have had lenient measures and listing bills; self-assessments and official assessments, 'tax inquisitors' and 'tax ferrets.' We have had taxation of debts and exemption of debts. . . . We, therefore, brush aside as undeserving of any serious consideration, the proposition to remedy the present evils of personal property taxation, by attempting to make

the law more rigorous. What has been tried so often and always so unsuccessfully everywhere else will not succeed here."

The Massachusetts tax commission of 1907 had this to say about the Ohio laws: "It will be seen that the law makers of Ohio have about exhausted human ingenuity in inventing drastic methods of securing the disclosure of personal property. The only known expedient which they seem to have overlooked is the use of torture, which was employed in the Roman Empire to force reluctant tax payers to disclose their personal estates. What has been the result of the drastic measures which Ohio has seen fit to employ? From the reports of the State Auditor we learn that in 1870 personal property, including, according to the Ohio classification, the property of railroads and some other corporations, amounted to 38 per cent of the total property assessed for taxation; in 1905 it amounted to 31 per cent; so that in Ohio, as elsewhere, an increasing proportion of the burden of taxation has fallen upon real estate."

emption intangible alth.

A second group of critics and advocates recognize the defects of the personal property tax and feel that it cannot be enforced when in direct opposition to economic law. They therefore call upon the legislatures to abolish all taxes on credits and intangibles and to establish a system of franchise, gross earnings, habitation and license taxes in lieu of the one now so generally existent. Their argument for the exemption of credits, moneys and other so-called intangibles is the familiar one that personal property, if returned for taxation at the regular tax rate and the cash value of the property, may pay a tax equal to one-third or one-half of the income. In addition, the point is made that promissory notes, bonds and obligations of different kinds are not tangible, but have their being through the ownership of existent tangible property; in other words that credits, not being property, their taxation, if permitted, would result in double taxation.

Much of this contention can be admitted, yet the courts have repeatedly held that credits are property subject to taxation. To the average man, a security, be it bond or stock, mortgage or mere credit, is a demand for purchasing power which men seek and prize

highly. In the opinion of the community the man who owns securities and receives an income from them because of his ownership, ought to share in the burdens of the community by paying something in the form of taxes. No one denies this proposition; the advocate of the personal property tax insists he shall do it directly, while the contender for no tax on credits and securities maintains that he does it indirectly, the whole matter being a question of economic adjustment. To add taxes means higher rates of interest, which the borrower must always pay, not the man who lends.

A mi grou

Between the two positions described above is a third, which recognizes something of the contention of both by taking what is essentially a compromise position. Income, rather than the value of what is taxed, is the keynote to the third view of the personal property tax. The procedure from this point of view is, briefly: to exempt from taxation some tangible property in the form of household goods, live stock, and mechanics' tools, and to place upon credit, stocks, bonds, moneys, mortgages, and promissory notes a moderate tax which will not be confiscatory, but eminently fair. In two states this method of taxation has been tried with results that stand out in marked contrast to those attained in states using the personal property tax. In Pennsylvania the assessment of intangibles reached in 1907 the enormous sum of $1,014,000,000. In Maryland, the assessors of the city of Baltimore alone secured an assessment of $150,000,000 upon intangibles in the same year.

A minority of a special Tax Commission which reported on taxation in New York in 1907 made an indictment of the personal property tax: —

The of th sonal erty t

We, the undersigned, members of the Tax Commission, have signed and concur in the conclusions and recommendations arrived at in our main report, but beg herewith to submit an additional and supplemental report for the taxation of incomes as a substitute for the present tax on personal property. We deem the following facts have been fully established before this Commission.

First. That the assessed value of all real estate in the State is approximately seven billions of dollars.

Second. That the assessed value of all personal property is approximately $800,000,000.

Third. That the market value of all real estate is but slightly in excess of its assessed valuation.

Fourth. That the value of all personal property owned by the citizens of this State is not less than twenty-five billions of dollars.

Fifth. That the income from investments made in real estate is of much lower percentage than that derived from personal property.

Sixth. That the richer a person grows the less he pays in relation to his property or income.

Seventh. That the owners of personal property have advocated and voted for local improvements without any substantial contribution on their part, until the tax on real estate has become a great burden.

unt
ssed
nst
ti-mil-
aires.

Eighth. Experience has shown that under the present system, personal property practically escapes taxation for either local or State purposes. As proof of this the following table showing the amount assessed against well-known multi-millionaires for personal property is as follows, for the year 1907 in the City of New York:

Oliver H. P. Belmont	$ 200,000 00
Cornelius Bliss	100,000 00
Andrew Carnegie	5,000,000 00
Henry Clews	100,000 00
Chauncey M. Depew	50,000 00
John W. Gates	250,000 00
Frank J. Gould	50,000 00
John D. Rockefeller	2,500,000 00
William Rockefeller	300,000 00
H. H. Rogers	300,000 00
Russell Sage	2,000,000 00
Alfred G. Vanderbilt	250,000 00
John Jacob Astor	300,000 00

232. *The Inheritance Tax*

The Wisconsin Tax Commission in a recent report made this statement of the case in favor of the tax on inheritances.

Econc theori the ta

The economic theories for the inheritance tax are several, such as the limitation of inheritance, the diffusion of wealth, co-heirship of the state, cost of administration, the special privileges accruing to the recipient of property, the accidental or fortuitous income, the receipt of property without toil or service, and the back tax theory. The enumeration does not include all the arguments advanced in justification of the tax, nor is it to be understood that agreement exists upon the validity of the theories just stated.

Is the sociali

The view that the power of taxation should be employed to limit the amount of inheritance or bequest and thus prevent the accumulation of large fortunes, although not necessarily socialistic, is generally so regarded, and does not have the approval of conservative men as a sound basis for taxation. This theory rests on the proposal that property above a specified large amount like $500,000, or $1,000,000, or the major part thereof, shall escheat to the state or be taken by the way of taxation. The doctrine of escheat or the diffusion of wealth is generally regarded as unsound and fails to satisfy the best writers on economics, although supported by eminent authors with great plausibility.

Back argum

The back tax theory has more popular support than any other, and in some states has been the most potent argument for the enactment of inheritance tax laws. The claim is that as the general property tax is largely evaded during life, it is no more than just that the state should recover the equivalent from the recipient of property by a tax that cannot be evaded. The impossibility of framing a law on a scientific basis to accurately reach the exact amount of the tax evaded during life will be recognized by the most casual observer.

Weaki in this argum

The difficulty of following the changes in the form, character, or value of property, throughout the life of a decedent, so as to show the true condition of the estate to the satisfaction of the court

administering it is unsurmountable, and such investigation is possible only for a very short period immediately preceding death. The logical application of the back tax argument would demand the enactment of a law for levying an inheritance tax equal to the tax which should have been but was not assessed against the property in the lifetime of the owner. The burden would be cast on the state of establishing by proof the assessment of the entire property from year to year with the taxes paid thereon, and the various kinds and value of property during the same periods, to ascertain the sum of taxes actually paid, and the amount which ought to have been paid. The difference would be the inheritance tax in each particular case if the validity of the argument is to find expression in the law.

aching angible operty.

In this country taxes on real estate are levied and paid. The instances where land escapes are exceedingly rare, generally due to the inadvertence of assessors, and in this state efficient provisions exist for placing all real and personal property on the tax roll whenever omitted in the three prior years. It is personal property of the intangible kind that escapes taxation. Visible property is generally found and taxed with as much certainty as real estate. Therefore to be logical only intangibles such as money, notes, stocks, bonds, mortgages and other credits should be subject to the inheritance tax. The loss of revenue legally due the state by the concealment or omission of this class of property is a strong inducement to the enactment of inheritance tax laws, and the argument is not to be wholly brushed aside when the policy of this legislation is considered. It must, however, be conceded that the theory of exacting from the heir the tax evaded by his ancestor cannot be sustained on equitable principles. It would be a penalty on the heir for the sins of his ancestor, which is not a good basis upon which to rest a just system of taxation.

ofessor y's argu- ent.

In the opinion of Dr. Richard T. Ely, an eminent authority on economics, the inheritance tax can best be sustained on the theory that it falls on property which comes to the recipient without effort or labor. "Property," he says, "which comes by inheritance is

an income received without toil. It is for the one receiving it an unearned increment of property, and on this account may properly be taxed. The most satisfactory basis upon which property can rest is personal toil and service of some kind and when property comes otherwise than as a return for social service, a special tax finds a good solid basis in justice." The accidental or fortuitous receipt of property on the occasion of the death of the owner is advocated by Dr. E. R. A. Seligman and Dr. Max West as a sound economic theory for the support of an inheritance tax.

Other objections considered.

The objections sometimes urged that an inheritance tax is a tax on capital or unequal or double taxation are unsound. The objection that the taxation is a discouragement to industry and thrift, and tends to drive capital away applies with far less force to the inheritance tax than to the general property tax. It sinks into comparative insignificance with the heavy burden of municipal taxes levied annually; whereas the inheritance tax is paid at long intervals, or once in a lifetime.

CHAPTER XXXII

SOCIAL AND ECONOMIC LEGISLATION

233. *The Spirit of Opposition to Corporations*

THE spirit which has led to much anti-trust legislation is revealed in this speech delivered by Mr. Burr in the last New York constitutional convention: —

'he trust orn of ıpacity; ıaintained y tyranny.

The trust has come determined to stay. It has determined to accomplish its ends, no matter what the cost. It controls the great staples of the country. It is born of rapacity and maintained by tyranny. It stretches out its tentacles, quietly and stealthily, until whole industries are in its grasp. It creates a monopoly by throttling all competitors. It grinds down those who furnish the raw material and supply the labor, and exacts the highest possible price from the consumer. It has become an impregnable citadel of capital. It employs the highest legal and business capacity to perfect and maintain its organization. It laughs at public opinion, rides roughshod over railroad enactments, and baffles the law courts. It bridles newspapers with subsidies, and sends members to the Legislature and to Congress. It has agents in every Legislature, and legislative bodies become as pliable as wax in the hands of the modellor under its powerful manipulation. It tampers with judges. It makes alliances with political leaders and hires professors of political economy to defend its formation and its objects. We have seen it within the past month stalk into the Senate of the United States and prevent the passage of laws needed by the people, until it forced the highest legislative body in the land to yield to its imperative demands. It is no longer an interference with trade. It is a menace to political liberty. It is no wonder, then, as President Cleveland stated to Mr. Wilson in his now

famous letter of July 2, on the tariff: "There is a natural democratic animosity to the methods of trusts and combinations."

Trust campa contrit tions.

What a disgraceful state of affairs is revealed by the sugar inquiry report, recently submitted to the Senate in which it is stated: "It is a matter of complete indifference to the Trust what duties are levied on sugar, so long as the form is ad valorem, and a sufficient differential is given in favor of refined sugar. The Sugar Trust, by the evidence of its president and treasurer, has contributed freely to the city and state campaign finds of both parties and its contributions have been made in years when national elections were held. This is a thoroughly corrupt form of campaign contributions, for such contributions, being given to two opposing parties, are not for the purpose of promoting certain political principles, but to establish an obligation to the giver on the part of whichever party comes into power. The Trust does not give to political parties for the promotion of political principles in which it believes but for the protection of its own interests as appears by the same testimony. The fact that it gives to both political parties is sufficient proof of the purposes of its contributions and of their dangerous nature. For these reasons, the undersigned have felt it important to lay before the Senate and the country the fact that the sugar schedule as it now stands is, according to the testimony, in the form desired by the Trust, and to point out, also, the methods by which the Sugar Trust reached what it desired and obtained, a substantial victory."

Comb tions capita demn lawye public

Combinations of capital, in the form of trusts or otherwise, have been repeatedly condemned by the best legal minds and the ablest thinkers in the country. It may be well to hear what some of them have said. In the opinion rendered by Judge Gibbons in the case of the Whiskey Trust, April, 1894, he said: "Trusts and combines should not exist. They and our Republican institutions cannot in their true force and virtue co-exist because the excellence of our institutions depends upon the opportunity, influence, and prosperity of the individual citizens, and the more widespread these opportunities and influences, and the more general

this prosperity, the more perfect and stable is the government itself."

idge ooley's inion.

A few things," says Judge Cooley, "can be said of trusts without danger of mistakes. They are things to be feared. They antagonize a leading and most invaluable principle of industrial life in their attempt not to curb competition merely, but to put an end to it. The course of the leading trusts of the country has been such as to emphasize the fear of them, and the benefits that come from its cheapening of an article of commerce are insignificant when contrasted with the mischiefs that have followed the exhibitions in many forms of the merciless power of concentrated capital. And when we witness the utterly heartless manner in which trusts sometimes have closed many factories and turned men willing to be industrious into the streets in order that they may increase profits already reasonably large, we cannot help asking ourselves the question, whether the trust as we see it is not a public enemy; whether it is not teaching the laborer dangerous lessons; whether it is not helping to breed anarchy."

ief istice erwood on rporations.

Says Sherwood, C.J., in Richardson *v.* Bull (77 Mich. 632): "The sole object of the corporation is to make money by having it in its power to raise the price of the article or diminish the quantity to be made and used, at its pleasure. Thus both the supply of the article and the price thereof are made to depend upon the action of a half dozen individuals, governed by a single motive or purpose, which is to accumulate money regardless of the wants or necessities of over 60,000,000 of people. Monopoly in trade or in any kind of business in this country is odious to our form of government.

"Its tendency is destructive of free institutions and repugnant to the instincts of a free people and contrary to the whole scope and spirit of the Federal Constitution, and is not allowed to exist under the express provisions of several of our State Constitutions.

orpora- ons dan- rous to a e govern- ent and dividual ghts.

"Indeed, it is doubtful if free government can long exist in a country where such enormous amounts of money are allowed to be accumulated in the vaults of corporations, to be used at dis-

cretion in controlling the property and business of the country against the interest of the public and the policy of the law for the personal gain and aggrandizement of a few individuals. It is always destructive of individual rights, and of that free competition which is the life of the business, and it revives and perpetuates one of the great evils which it was the object of the framers of our form of government to eradicate and prevent. It is alike destructive to both individual enterprise and individual prosperity whether conferred upon corporations or individuals, and, therefore, public policy is, and ought to be, as well as public sentiment, against it. All combinations among persons or among corporations for the purpose of raising or controlling the prices of merchandise or of any of the necessaries of life, are monopolies and intolerable, and ought to receive condemnation of all courts."

Senator Depew's opinion.

Chauncey M. Depew in an address before the International Brotherhood of Engineers in Pittsburg, Pa., in October, 1890, said: "In the United States our pace is so rapid, and our development so phenomenal, that without due consideration we are apt to rush to extremes. This is true of both capital and labor. The money required to construct telegraphs, to build railroads, to establish banks, was beyond the power of the individual and so the State permitted aggregated capital representing the contributions of many, to perform these works. At the same time, through commissions, departments and State officers, the hand of the Government was constantly upon them for the protection of the public against extortion or discrimination. But within a few years everything from pine lands to peanuts, from steel rails to sardines, has been organized into some form of corporation or trust. This universal effort to absorb the individual, to divide the people into employing companies and employees, and to destroy competition, will inevitably end in disaster. . . ."

234. *Control of Railways by Commission*

The most popular form of control over public service corporations is through a commission, and these sections from the Okla-

homa constitution indicate in a general way the power usually conferred (with more or less modification) upon such a body:—

e right to scribe s.

SEC. 18. The Commission shall have the power and authority and be charged with the duty of supervising, regulating, and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the Commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the commission, within the scope of its authority, shall be unlawful and void.

e collec- of in- nation.

The Commission shall also have the right, at all times, to inspect the books and papers of all transportation and transmission companies doing business in this State, and to require from such companies, from time to time, special reports and statements, under oath, concerning their business; it shall keep itself fully informed of the physical condition of all the railroads of the State, as to the manner in which they are operated, with reference to the security and accommodation of the public, and shall, from time to time, make and enforce such requirements, rules, and regulations as may be necessary to prevent unjust or unreasonable discrimination and extortion by any transportation or transmission company in favor of, or against any person, locality, community, connecting line, or kind of traffic, in the matter of car service, train or boat schedule, efficiency of transportation, or transmission, or otherwise, in connection with the public duties of such company.

The right of the company to a hearing.

Before the Commission shall prescribe or fix any rate, charge or classification of traffic, and before it shall make any order, rule, regulation, or requirement directed against any one or more companies by name, the company or companies to be affected by such rate, charge, classification, order, rule, regulation, or requirement, shall first be given, by the Commission, at least ten days' notice of the time and place when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, to the end that justice may be done, and shall have process to enforce the attendance of witnesses; and before said Commission shall make or prescribe any general order, rule, regulation, or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation, or requirement shall first be published in substance, not less than once a week, for four consecutive weeks, in one or more of the newspapers of general circulation published in the county in which the Capitol of this State may be located, together with the notice of the time and place, when and where the Commission will hear any objections which may be urged by any person interested, against the proposed order, rule, regulation, or requirement; and every such general order, rule, regulation, or requirement, made by the Commission, shall be published at length, for the time and in the manner above specified, before it shall go into effect, and shall also, so long as it remains in force, be published in each subsequent annual report of the Commission.

The physical valuation of properties.

SEC. 29. The Commission shall ascertain, and enter of record, the same to be a public record as early as practicable, the amount of money expended in construction and equipment per mile of every railroad and other public service corporation in Oklahoma, the amount of money expended to procure the right of way, and the amount of money it would require to reconstruct the roadbed, track, depots, and transportation facilities, and to replace all the physical properties belonging to the railroad or other public service corporation. It shall also ascertain the outstanding bonds, de-

bentures, and indebtedness, and the amount, respectively, thereof, when issued, and rate of interest, when due, for what purposes issued, how used, to whom issued, to whom sold, and the price in cash, property, or labor, if any, received therefor, what became of the proceeds, by whom the indebtedness is held, the amount purporting to be due thereon, the floating indebtedness of the company, to whom due, and his address, the credits due on it, the property on hand belonging to the railroad company or other public service corporation, and the judicial or other sales of said road, its property or franchises, and the amounts purporting to have been paid, and in what manner paid therefor. The Commission shall also ascertain the amounts paid for salaries to the officers of the railroad, or other public service corporation, and the wages paid its employees. For the purpose in this section named, the Commission may employ experts to assist them when needed, and from time to time, as the information required by this section is obtained, it shall communicate the same to the Attorney General by report, and file a duplicate thereof with the State Examiner and Inspector for public use, and said information shall be printed, from time to time, in the annual report of the Commission.

235. *The Operations of a Railway Commission*

This extract from a recent report of the North Carolina Corporation Commission illustrates the character of the business usually transacted in the control of public service corporations: —

Statistics of railways.

There are within this State 3,859.09 miles of railroad, not including double and side-tracks — an increase over last year of 59 miles. Of our railroads, 2,839.51 miles are operated by the Southern Railway Company, Atlantic Coast Line Railroad Company, and Seaboard Air Line Railway, divided as follows: Southern Railway Company, 1,279.56 miles; Atlantic Coast Line Railroad Company, 947.83 miles; Seaboard Air Line Railway, 612.12 miles. Gross earnings of railroads within the State were $22,441,705; net earnings were $8,470,483 — an increase in gross earnings

of $2,053,765 and in net earnings of $931,472 over last year. In the operation of railroads 15,877 persons were employed within the State. During the year 5,089,500 persons were transported within the State.

Accidents.

In the operation of trains 35 employees were killed and 492 injured; 5 passengers were killed and 143 injured; 74 other persons were killed and 152 injured.

Character of the complaints against companies.

Three hundred and eighty-seven complaints were made to the Commission during the year, the most of which have been disposed of. Some in which it was necessary to make further investigation are still pending. As the records of our office will show, these complaints were of great variety. A great many of them were for alleged failure of railroad companies to render proper service. For example: complaints were made for failure to keep passenger schedules; to bulletin the arrival of trains; to furnish cars for shipment of freight; to transport freight, carload and less than carload, within a reasonable time after same was received; to deliver freight after its arrival at destination. In many cases these complaints were sustained by proof or admission of the carriers.

Causes of failure to keep schedules.

It was found that the cause of failure to keep passenger schedules as to through trains was, in many instances, that their connections had not been kept; and as to other trains, that they were delayed on account of failure of through trains to keep their schedules. Passenger service that is rendered by local trains which run upon their own schedule, or such trains as connect with but do not wait an unreasonable time on through trains, is more satisfactory. It may be that upon this idea the passenger service will be improved; if not, there will be a demand for more local trains to be run independent of connections. . . .

How an important controversy was settled.

Complaints in regard to freight service will appear in detail in another part of this report. We will therefore only call attention to the following: The furniture manufacturers at High Point complained that, although often requested to furnish cars for shipment of furniture, the Southern Railway had failed to do so;

that there was at that time a demand for upwards of three hundred furniture cars; that goods had been sold, and unless cars could be had the contracts would be broken and might be cancelled, and that no penalty provided by law or damages which they could recover from the company would be an adequate remedy; that their damage in loss of trade could not enter into damages which they might recover, and yet this would be a great part of the threatened loss. This complaint was filed on the 29th day of July, 1905, and the Commission took the matter up with the Southern Railway Company, and held a session at High Point on the first day of August, 1905, which session was attended by the manufacturers and shippers interested and by the traffic manager and other agents for the Southern Railway Company. At this session complainants succeeded in convincing the railroad officials of their urgent need of cars, and the railroad officials undertook very energetically to procure for complainants necessary cars, and what promised to be a serious car famine was averted. . . .

Delay in transporting freight.

The other part of the complaint, as to failure to transport freight within a reasonable time, is, we regret to say, not confined to any part of the State, but is frequent on all railroads and at many places. The enforcement of the penalty for this negligence, which would seem to be severe enough, has, we regret to say, not yet had the effect to arouse the railroads to proper diligence, nor does the penalty compensate for the loss sustained in many cases. If the seller cannot have his goods delivered with any regularity or certainty he will lose his customers, and it is in holding the trade rather than the delivery of a particular shipment that the shipper is especially interested. We have taken up each case called to our attention with the railroads and had same investigated, with the hope of placing the blame properly and thereby correcting the evil.

236. *Control of State Regulation by the Federal Judiciary*

In the control of corporations, the states are restricted by the provisions of the federal Constitution, among which the due

process clause of the Fourteenth Amendment is one of the most effective. The way in which a state statute may be declared invalid by the Supreme Court is illustrated by the opinion in a Minnesota railway case: —

The Minnesot law does provide f judicial review.

The Supreme Court of Minnesota authoritatively declares that it is the expressed intention of the Legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the Act, are not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are equal and reasonable charges; that the law neither contemplates nor allows an issue to be made or inquiry to be had as to their equality or reasonableness in fact; that, under the statute, the rates published by the commission are the only ones that are lawful, and, therefore, in contemplation of law the only ones that are equal and reasonable; and that, in a proceeding for a *mandamus* under the statute, there is no fact to traverse except the violation of law in not complying with the recommendations of the commission. In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable.

This is n due proc of law.

This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the State court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice.

Under section 8 of the statute, which the Supreme Court of

The arbitrary power of the commission.

Minnesota says is the only one which relates to the matter of the fixing by the commission of general schedules of rates, and which section, it says, fully and conclusively provides for that subject, and is complete in itself, all that the commission is required to do is, on the filing with it by a railroad company of copies of its schedules of charges, to "find" that any part thereof is in any respect unequal or unreasonable, and then it is authorized and directed to compel the company to change the same and adopt such charge as the commission "shall declare to be equal and reasonable," and, to that end, it is required to inform the company in writing in what respect its charges are unequal and unreasonable. No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law; and although, in the present case, it appears that, prior to the decision of the commission, the company appeared before it by its agent, and the commission investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was or how the result was arrived at.

Reasonableness of rate a matter for judicial determination.

By the second section of the statute in question, it is provided that all charges made by a common carrier for the transportation of passengers or property shall be equal and reasonable. Under this provision, the carrier has a right to make equal and reasonable charges for such transportation. In the present case, the return alleged that the rate of charge fixed by the commission was not equal or reasonable, and the Supreme Court held that the statute deprived the company of the right to show that judicially. The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its

property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property and thus, in substance and effect, of the property itself, without due process of law and in violation of the constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws.

237. *The Supreme Court and Labor Legislation*

In making laws in behalf of the working class, the state legislatures are compelled to take into account the principles applied by the federal Supreme Court in protecting private rights. For example, the court recently held that a section of the New York labor law, providing that no employees should be required or permitted to work in bakeries more than sixty hours a week or ten hours a day, was not "a legitimate exercise of the police power of the state, but an unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract, in relation to labor." The reasoning of Mr. Justice Peckham for, and Mr. Justice Holmes against, this position is thus summed up: —

Liberty of contract and the police power.

MR. JUSTICE PECKHAM. The statute necessarily interferes with the right of contract between the employer and the employés, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. Allgeyer *v.* Louisiana, 165 U. S. 578. Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts.

Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions as the Fourteenth Amendment was not designed to interfere. . . .

This law is beyond the police power.

We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employé, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there would seem to be no length to which legislation of this nature might not go.

The relation of the trade to health considered.

We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employé. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that that occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the Government. It might be safely affirmed that almost all occupations more or less affect the health. There must be more

than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family. . . .

The opinion c the court based up an econo theory.

Mr. Justice Holmes. I regret sincerely that I am unable to agree with the judgment in this case, and that I think it my duty to express my dissent. This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement had nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school-laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*.

Cases in which government interference was sustained by the court.

The other day we sustained the Massachusetts vaccination law. Jacobson *v.* Massachusetts, 197 U. S. 11. United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. Northern Securities Co. *v.* United States, 193 U. S. 197. Two years ago we upheld the prohibition of sales of stocks on margins or for future delivery in the constitution of California. Otis *v.* Parker, 187 U. S. 606. The decision sustaining an eight hour law for miners is still recent. Holden *v.* Hardy, 169 U. S. 366. Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

The meaning of "liberty" in the Fourteenth Amendment.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of *in*equality I think it unnecessary to discuss.

INDEX

NOTE. — A guide to all of the important topics is furnished by the Table of Contents.

Accounting, municipal, 514 ff., 535 ff.; state and local, 565.
Administration, national, 197 ff.; centralization in, 436 ff.; municipal, 517, 521 ff.
Ambassadors, expenses of, 295 ff.
Amendment, clause of federal Constitution, 56; the process of, 57 ff.; initiation of, by a state, 60 ff.; clause of the New York constitution, 411 ff.
Amendments to federal Constitution, I–XI, 134 ff.; XIII, 57 ff., 392; XIV, 393 f., 394 ff., 615 ff., 617 ff.; XV, 394.
Apportionment, legislative, 75 ff., 462 ff.; congressional, 218 f., 393.
Appropriation bills, 263, 341 f.
Appropriations, obtaining estimates for, 338 ff.; in states, 459 f.
Arbitration, international, 110; treaty, 305 ff.
Army, of the United States, 309 f.; American theory of, 320 ff.
Articles of Confederation, 25 ff.; criticism of, 38 ff.
Assembly district leader, 579 f.
Assessment, problems of, 590 ff.
Assessor, office of, 590 ff.
Attorney-general, state, 452 f.

Bank, federal, constitutionality of, 63 ff.
Bill of attainder, 134, 391.
Bills, kinds of, in Congress, 262 ff.; preparation of, 267 ff.; in state legislatures, 457 ff., 468 ff.
Blockade, establishment of, 312 f.
Boss, municipal, 125 ff.

Campaign, the national, conduct of, 171 ff.; contributions, 572 ff.
Caucus, 12 note; legislative, 112 f.; congressional, 114 ff., 247 ff.; condemned, 116 ff.
Chairman, of the national committee, 169 ff.
Charter, municipal, 510 ff.
Citizenship, 150 ff., 393 f.
Citizens' Union, 486.
Civil service act, 208 ff.
Commerce, under Articles of Confederation, 40; constitutional provisions relating to, 343; judicial interpretation of the term, 344 ff.; interstate, 346, 348 ff., 352 ff.; Interstate Commission, 356 ff.; state control of, 606 ff.
Commission, Civil Service, 208 ff.; state government by, 453 ff.; Interstate Commerce, 356 ff.; government by, 529 ff.; public service, 609 ff.
Committee of Correspondence, 16 ff.
Committees, conference, 272; legislative, 469 ff., 471 f., 474; party, 586 ff.
Congress, Continental, 18 ff.; under Articles of Confederation, 26 ff.; the federal, 214 ff., 236 ff., 247 ff.
Constituencies, size of, 464.
Constitutionality, considered by the Supreme Court, 63 ff.; by Congress, 66 ff.
Constitution, the federal, convention for drafting, 43 ff.; development of, 56 ff.; amendment clause, 56; and executive practice, 69 f.; see Congress, President, Federal Judiciary, Amendments, etc.
Constitutions, early state, 72 ff.
Construction, "strict," 237 ff.; "liberal," 240 ff.
Continental Congress, 18 ff.
Contracts, obligation of, 391.
Convention, call for Maryland, 36; call for the constitutional convention of 1787, 43 f.; New York appoints delegates to the constitutional, 44;

difficulties confronting the constitutional, 44 ff.
Convention, party, 119 ff.; Benton's criticism of, 120 ff.; Lincoln's defense of, 123 ff.; call for a national, 160 ff.; composition of, 161 ff.; oratory in a, 164 ff.; "packed," 585 f., 588 ff.
Corporations, control of, 88 ff., 348 ff., 481, 609 ff.; legislation against, 484 ff.; in politics, 572 ff.; opposition to, 606 ff.
Council, municipal, 521 ff., 526 ff., 529 ff.
Counties, 465, 561 f.
Cuba, resolution for intervention in behalf of, 378; Platt amendment relating to, 379 f.

Debt, state, 460 ff.
Declaration of Independence, 21 ff.
Democratic party, 95 f., 102, 103 ff., 403 ff.
Department of state, 200 f., 291.
Departments, federal, 200 ff.; state, 432 ff., 517 ff.
Diplomatic representatives, 292 ff.
Due process of law, 614 ff., 617 ff.

Elections, frequency of, 83.
Electors presidential, 154 ff., 159 f.
Electric lighting service, 538 ff.
Executive power, of royal governor, 2 ff.; federal, 176 ff.; state, 432 ff.; growth of, 442 ff., 476.
Exports, 391.
Ex post facto law, 134, 391.
Extradition, under the Articles of Confederation, 26; under the Constitution, 148 f.
Extraordinary session, call of, 447 f.

Federalists, 92 ff.
Federal law, supremacy of, 140 ff.
Finance, federal, 323 ff.; state, 590 ff.; control in state, 565; municipal, 514 ff., 522 ff.
Foreign affairs, under the Articles of Confederation, 29; conduct of, 291 ff.
Forests, national, 363, 364 ff.
Franchises, municipal, 531, 548 ff.
Fraud orders, 204 f.

General property tax, 592 ff.
Gerrymander, 158 ff., 219 f.
Governor, the royal, 2 ff.; in a corporate colony, 7; in early state constitutions, 73 ff.; powers and duties of, 432 ff.
Governors' Conference, 361 ff.
Grand jury, 88.

Habeas corpus, 87, 134.
Hamilton, plea for strong government, 47 ff.
Health department, municipal, 543 ff.
Home rule, municipal, 509 ff.
House of Representatives, 214 ff., 253 ff.

Immigration, 100.
Impeachment, 216.
Implied powers, doctrine of, 63 ff.
Imports, 391.
Inheritance tax, federal, 323 ff., 331; state, 603 ff.
Initiative and referendum, in Oklahoma, 413 ff.; in Oregon, 415 ff.; arguments, for and against, 419 ff.
Injunctions, 88.
Instruction, of Representatives in Congress, 233 ff.
Irrigation, 363, 371 ff.

Jeffersonians, 92 ff.
Judiciary, federal, 273 ff., 614 ff.; state, 477, 488 ff. See Supreme Court, federal.
Jury trial, 87, 377, 490, 495 ff.
Justices of the peace, 13 f.

Labor, legislation, 91, 617 ff.; in city government, 554 ff.
Legislation, 427 ff.; special, 458; reference bureau, 473; over-, 475 ff.
Legislature, colonial, 3, 7, 8, 10, 16; limitations on state, 457 ff.; procedure in, 466; reform in, 467 ff.; and railways, 478, 512 ff.
Liberty, religious, 10; under the Fourteenth Amendment, 394 ff., 615 ff.
Lobby, organization of, 482 ff.
Local government, 10 ff., 556 ff.
Log-rolling, 269.

Machines, political, 82 f., 127 ff. See Party.
Madison, on Articles of Confederation,

38 ff.; his views on the federal Constitution, 49 ff.
Martial law, 449 ff.
Mayor, power of, 519, 524.
Militia, national, 308 f.
Mineral lands, reservation of, 368 ff.
Money, 31; paper, 39, 391.
Monopolies, prohibition of, 89, 358 ff., 606 ff.
Municipal government, 509 ff.; ownership, 539 f., 548 ff.

National committee, chairman of, 169 ff.
Naturalization, 150 ff., 393.
Negroes, excluded from the suffrage, 401 ff.

Office-holders, political activity of, 578 f.

Pardoning power, of the royal governor, 5; exercise of, 448.
Parks, municipal, 545 ff.
Party, political, 50 ff., 92 ff., 160 ff., 220, 247 ff., 567 ff.
Personal property tax, 597 ff.
Philippines, 111, 377, 380, 385.
Platforms, party, 95 ff.
Platt amendment, 379 f.
Police, 505 ff.
Police power, 394 ff.
Politics. See Party.
Popular election, of United States Senators, 61 ff.
Porto Rico, 111; government of, 388 ff.
President, 69 ff.; provisions of federal Constitution relating to, 154 ff., 176 ff.; methods of nominating, 160 ff.; as head of national administration, 177 ff.; and foreign affairs, 183 f.; war powers of, 184 ff., 313 ff.; veto power of, 187 ff.; message of the, 192 f.; influence of, on legislation, 193 ff.; power of removal, 197 ff., 265; negotiation of treaties, 297 ff.; recognition of foreign governments, 303 ff.; use of troops by, 317 ff., 393.
Primary legislation, 131 ff., 586 ff.
Private bills, 263, 469.
Privileges and immunities, in the Articles of Confederation, 26; in the Constitution, 146 ff., 392 f.
Prohibitions, on the federal government, 134 ff.; on state government, 391 ff.
Public opinion bill, 418 f.

Railroads, 108 ff., 352 ff., 609 ff.
Ratification, of the federal Constitution, 54 ff.
Rebates, 354.
Recall, the system of, 531 f.
Reclamation, of arid lands, 371 ff.
Referendum, see Initiative and referendum.
Registration, of voters, 401.
Removal, President's power of, 198 ff.
Rendition, interstate, 148 f., 392.
Repeating, in elections, 584 f.
Republican party, 96 ff.
Resources, national, 361 ff.
Revenue bill, preparation of, 263, 333 ff.
Rotation in office, doctrine of, 81 ff.

Senate, the federal, 215 ff.; elections to, 221 f., 225 ff.; original purpose of, 222 ff., 270; powers in the negotiation of treaties, 297 ff.
Senatorial courtesy, 212.
Senators, election of, 221 f., 225 ff.; state, 72.
Separation of powers, 117, 138 ff.
Slavery, 95 ff., 392 ff.
Speaker, duties of, 256; political significance of, 257 ff.; sources of the power of, 260 ff.
Special legislation, nature of, 84 ff.
Spoils system, 206 ff., 211.
States, sovereignty of, 25; prohibitions on, 27 f.; conduct of, under Articles of Confederation, 38 ff.; pretensions of large and small, 46; constitutional development in, 87 ff.; constitutional limitations on, 391 ff.; government of, 391 ff.; admission of, 399; selection of officers of, 438 ff.
Suffrage, 36, 72, 78; under the federal Constitution, 143 ff., 393 ff.; in New York, 399; and the negro, 401 ff.; woman's, 405 ff.
Supreme Court, the federal, 140 ff.; constitutional provisions relating to, 273 ff.; jurisdiction of, 273; power of, over federal statutes, 274 ff.; over state statutes, 278 ff.; Jefferson's

criticism of, 281 ff.; political character of cases before, 283 ff.; place of in the American system, 288 ff., 614 ff.

Tammany Hall, 127, 567 ff., 581 ff.
Tariff, protective, 99, 330, 333 ff., 337 f.
Taxation, federal, the uniformity rule in, 323 ff.; direct, 324, 327; of inheritances, 325; apportionment of, 327; of incomes, 328 f.; social implications of, 331 ff.; and commerce, 348 ff.; state, 480, 590 ff.
Tenement house department, 541.
Tenure of office, 83 f.
Territories, constitutional provisions relating to, 375; government of, 375 ff., 397 ff.
"Third term" doctrine, 70 f.
Town meeting, Boston, 10 ff., 556 ff.
Township, 560 f.
Treason, definition of, 135.
Treasurer, county, 563.
Treaties, negotiation of, 297 ff.
Trusts, Sherman act against, 358 ff. See Corporations.

Uniformity, the rule of, in taxation, 323 ff.
Unit rule, 167 f.

Veto power, 4, 217, 444 ff.
Vice-President, 154 ff., 216, 393.
Volunteers, call for, 310 f.

War, declaration of, 310; direction of, 313 ff.
Waterworks, municipal, 535 ff.
Ways and means committee, 333 ff.
Whigs, 94 f.
Woman's suffrage, 405 ff.

INVALUABLE TO TEACHERS AND STUDENTS OF HISTORY

An Introduction to the English Historians

By CHARLES A. BEARD *Cloth, 12mo, $1.60 net*

SUMMARY OF CONTENTS

PART I — THE FOUNDATIONS OF ENGLAND . . . . . Page 1
PART II — FEUDALISM AND NATIONALISM . . . . . Page 61
PART III — MEDIÆVAL INSTITUTIONS . . . . . Page 158
PART IV — THE TUDOR AGE . . . . . Page 231
PART V — THE STUART CONSTITUTIONAL CONFLICT . . . Page 331
PART VI — THE EXPANSION OF ENGLAND . . . . . Page 423
PART VII — ENGLAND UNDER THE GEORGES . . . . Page 466
PART VIII — THE AGE OF REFORM . . . . . Page 538
PART IX — THE EMPIRE IN THE NINETEENTH CENTURY . . Page 623

A brief course in English history should introduce the student to the authorities on special topics and periods who should be studied with care. To solve this problem in part, Dr. Beard has prepared this handy volume of extracts chosen from Stubbs, Freeman, Gardiner, Green, Hallam, Lecky, Macaulay, and other English historians of note. To each extract is added a short biographical note designed to introduce the student to the materials on which to base a critical appreciation of the author's views.

"Dr. Beard's 'Introduction to the English Historians' — both from the pedagogical and the research points of view — deserves unqualified commendation. It is intelligently discriminating in its selections, liberal and mature in its comment, and in its arrangement it shows the results of thorough scholarship and fruitful classroom experience. It should save both teachers and students of English history a vast amount of time and labor." — *The Independent.*

"The study of English history is indispensable to any intelligent discussion of our own relation to the political conditions of the world as it is and as it is likely or liable to be. In such a study as the times demand, an endless amount of time goes to useless research work. Hence this book with six hundred pages of readings from the masters in English historical writings. This is a service to scholarship which will be appreciated by any one who but glances through its pages. Great credit is due Dr. Beard for this service." — *Journal of Education.*

PUBLISHED BY

THE MACMILLAN COMPANY

64-66 FIFTH AVENUE, NEW YORK

STANDARD BOOKS ON HISTORY AND POLITICS

The American Federal State

A text-book in civics for high schools and colleges. By ROSCOE L. ASHLEY. *Cloth, 12mo, $2.00 net*

The American Commonwealth

By JAMES BRYCE.

A knowledge of the material contained in this book is indispensable to any one who would acquire a just estimate of American institutions.

One Volume Edition, $1.75 net

The National Administration of the United States

By JOHN A. FAIRLIE, Assistant Professor of Administrative Law, University of Michigan. *Cloth, 12mo, $2.00 net*

Politics and Administration

By FRANK J. GOODNOW, Professor of Administrative Law, Columbia University. *Cloth, 12mo, $1.50 net*

History of Politics

By EDWARD JENKS, M.A. *Cloth, 16mo, $.40 net*

A History of American Political Theories

By CHARLES E. MERRIAM, Ph.D., Associate in Political Science, University of Chicago. *Cloth, 12mo, $1.50 net*

Democracy and the Organization of Political Parties

By M. OSTROGORSKI. Translated by F. CLARKE.

Two volumes, cloth, 8vo, $6.00 net

Political Problems of American Development

By ALBERT SHAW, LL.D. *Cloth, 12mo, $1.50 net*

The United States: An Outline of Political History

By GOLDWIN SMITH. *Cloth, 12mo, $2.00 net*

PUBLISHED BY

THE MACMILLAN COMPANY

64-66 FIFTH AVENUE, NEW YORK

SECTIONAL HISTORIES
OF
THE UNITED STATES

Civil War and Reconstruction in Alabama

By WALTER L. FLEMING, Ph.D., Professor of History in West Virginia University. *Cloth, 8vo, $5.00 net*

"The most comprehensive and valuable work of the kind that has yet been written." — *Dial.*

Reconstruction in Mississippi

By J. W. GARNER. *Cloth, 8vo, $3.00 net*

Robert Y. Hayne and His Time

By THEODORE D. JERVEY.

An interesting picture of social life and conditions when South Carolina was at the height of her prosperity and influence.

Cloth, 8vo, $3.00 net

The History of South Carolina

From the inception of the colony to the end of the Revolution. By EDWARD MCCRADY, LL.D., President of the Historical Society of South Carolina. *Four volumes, cloth, 8vo, $3.50 net each*

Maryland as a Proprietary Province

By N. D. MERENESS *Cloth, 8vo, $3.00 net*

The Opening of the Mississippi

A struggle for supremacy in the American interior. By FREDERICK A. OGG, Fellow in History, Harvard University. *Cloth, 12mo, $2.00 net*

"A general history of the great valley which is one of the most interesting, scholarly, and important that has thus far appeared." — *The World To-day.*

North Carolina

By CHARLES L. RAPER, Associate Professor of Economics and Associate Professor of History in the University of North Carolina.

Cloth, 8vo, $2.00 net

From the Cotton Field to the Cotton Mill

By HOLLAND THOMPSON, Sometime Fellow in Columbia University.

Cloth, 12mo, $1.50 net

PUBLISHED BY

THE MACMILLAN COMPANY

64-66 FIFTH AVENUE, NEW YORK

AMERICAN HISTORY

History of the United States.

The Period of Colonial History

By Professor EDWARD CHANNING *In Two Volumes*

"Many as are the histories of the United States, Professor Channing has ample justification in adding another to the list, not only in his new point of view but in his exhaustive knowledge. His narrative flows on so smoothly that it is only when one realizes the immense mass of controversies which he settles with calm common sense, the thoroughness of his bibliography, the sanity of his criticisms on the hundreds of authors consulted, that one grasps the fulness of his erudition. . . . Between the mother country and the colonies he holds the scales fair, doing justice to Great Britain without falling into the exaggerated imperialism of some recent American authors." — *The English Historical Review.*

Cloth, gilt top, $5.00 net

The American Colonies in the Seventeenth Century

By Professor HERBERT L. OSGOOD *In Three Volumes*

"The work is the first adequate account of the origin, character, and development of the American colonies as institutions of government and as parts of a great colonial system; and it displays on the part of the author a wide and deep knowledge of the documentary evidence for colonial history and rare powers of analysis and interpretation." — *American Historical Review.*

Cloth, 8vo, $9.00

History of the United States

From the Compromise of 1850 to the Final Restoration of Home Rule at the South in 1877

By JAMES FORD RHODES *In Seven Volumes*

"In rare and fortunate conjunction, the distinguishing characteristics of this work are noteworthy fairness, sound scholarship, and a high degree of narrative skill. . . . It must be deemed preëminently the standard work for the period with which it deals, and a work so exhaustive and so able that it will probably be long before its supremacy is challenged." — *The Outlook.*

The set, in cloth, $17.50

PUBLISHED BY

THE MACMILLAN COMPANY

64-66 FIFTH AVENUE, NEW YORK